Supreme Court, U.S.
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No. 97-13

In The
Supreme Court of the United States

October Term 1996

SALLY W. DREW,
JUDY MAYO,

Petitioners,

v.

RICOH CORPORATION,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Petition for Writ of Certiorari

Vicki G. Golden
Counsel of Record
Michael G. Kane
CASHDAN & GOLDEN, PLLC
1150 Connecticut Avenue, NW
Suite 900
Washington, DC 20036-4104
(202) 862-4330

Counsel for Petitioners

48 pp

STATEMENT OF QUESTIONS PRESENTED

1. Whether a Title VII plaintiff is entitled to a "motivating factor" jury instruction in accordance with 42 U.S.C. § 2000e-2(m), even if she does not present direct evidence of discrimination.

2. Whether a Title VII plaintiff is entitled to judgment in her favor when she establishes that her gender was a motivating factor in an adverse employment decision, even if the employer establishes that it would have taken the same action absent consideration of the impermissible factor.

3. Whether the employer in a Title VII employment discrimination case, in order to establish that it would have taken the same action absent consideration of the discriminatory factor, is required to (1) present some objective evidence as to its probable decision in the absence of the impermissible motive and (2) show that a legitimate reason standing alone would have induced it to make the same decision.

PARTIES

The parties below were Sally W. Drew and Judy Mayo, plaintiffs, and Ricoh Corporation, defendant.

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PRIOR OPINIONS

Th opinion of the United States Court of Appeals for the Fourth Circuit, dated, March 31, 1997, is unpublished and is reproduced at pages 1 through 6 of the appendix. The unpublished order and opinion of the United States District Court for the Eastern District of Virginia, dated November 7, 1995, are reproduced at pages 7 through 21 of the appendix.

JURISDICTION

Petitioners seek this Court's review of the judgment entered on March 31, 1997, by the United States Circuit Court of Appeals for the Fourth Circuit, by a Petition for a Writ of Certiorari pursuant to the jurisdiction conferred by 28 U.S.C. § 1254(1). This petition is timely because it was filed within ninety days of March 31, 1997, the date of entry of judgment in the court below. Rules 13.1 and 29.2.

STATUTES INVOLVED

42 U.S.C. § 2000e-2(m)

> Except as otherwise provided in this subchapter, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors motivated the practice.

42 U.S.C. § 2000e-5(g)(2)(B)

> On a claim in which an individual proves a violation under section 42 U.S.C. 2000e-2(m) of this title and a respondent demonstrates that the respondent would have taken the same action in the absence of the impermissible motivating factor, the court—
>
> (i) may grant declaratory relief, injunctive relief ... and attorney's fees and costs demonstrated to be directly attributable only to the pursuit of a claim under 42 U.S.C. 2000e-2(m) of this title; and
>
> (ii) shall not award damages or issue an order requiring any admission, reinstatement, hiring, promotion, or payment, described in subparagraph (A).

STATEMENT OF THE CASE

This Title VII gender discrimination case arises out of the refusal of Ricoh Corporation ("Ricoh") to assign the plaintiffs, Sally W. Drew and Judy Mayo, who were the only female sales representatives in the Government Facsimile Division, the more lucrative Department of Defense ("DOD") accounts that it assigned to male sales representatives who were comparably qualified and experienced.

Ricoh is one of the leading manufacturers of digital facsimile systems and sells Securefax systems to federal civilian government agencies and DOD agencies. Securefax

systems (in conjunction with encryption devices) are used to communicate hard copy classified government documents. Ricoh's Government Facsimile Division handles all of Ricoh's sales of Securefaxes and some sales of commercial fax machines to the federal government and to primary federal contractors.

Because Securefax systems are two to four times more costly than commercial faxes, account executives earned two to four times more in commissions for selling Securefax systems than for selling commercial fax systems. DOD bought a larger number of fax machines of both kinds than civilian agencies, and, as a result, the total commissions for the male account executives, who sold Securefax systems and commercial faxes to DOD, were two to four times higher than those of Ms. Drew and Ms. Mayo, who sold only to civilian agencies. Although Ms. Drew and Ms. Mayo made repeated requests to their managers to assign them DOD accounts, the requests were refused or simply ignored and Ricoh continued to steer all DOD Securefax accounts to males.

Ms. Drew and Ms. Mayo filed a complaint on March 1, 1995, in the United States District Court for the Eastern District of Virginia, alleging employment discrimination on the basis of sex. The case proceeded to a jury trial on October 10-13, 1995. The jury returned a verdict, finding that the plaintiffs' sex was a motivating factor in Ricoh's decision not to assign Ms. Drew and Ms. Mayo the profitable

DOD accounts, but that it would have made the same decision even if the unlawful motive were not present.[1]

The district court interpreted this as a defendant's verdict and entered judgment for Ricoh. Plaintiffs objected and filed a motion to alter or amend judgment and for equitable relief, based on the jury's verdict that gender was a motivating factor in Ricoh's decision not to assign them DOD accounts. Plaintiffs also filed a motion for judgment as a matter of law or, in the alternative, for a new trial as to whether Ricoh would have made the same decision absent consideration of plaintiffs' gender, based on the fact that Ricoh did not present objective evidence as to its probable decision in the absence of the impermissible motive nor show that a legitimate reason standing alone would have induced it to make the same decision. Ricoh filed a renewed motion for judgment as a matter of law, arguing that there was insufficient evidence to support the jury's finding that sex was a motivating factor.

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[1] The special verdict form required the jury to answer two questions:

> 1. Have plaintiffs proved that plaintiffs' sex was, more likely than not, a motivating factor in the decision of defendant not to distribute DOD accounts to plaintiffs?
>
> 2. Would Ricoh more likely than not have made the same employment decision concerning the plaintiffs even if the unlawful motive, namely plaintiffs' sex, was not present?

The jury answered yes to both questions for both Ms. Drew and Ms. Mayo.

A few days before the scheduled hearing on the post-trial motions, the United States Court of Appeals for the Fourth Circuit issued its opinion in *Fuller v. Phipps*, 67 F.3d 1137 (4th Cir. 1995). The *Fuller* court held that a plaintiff is not entitled to a "motivating factor" instruction pursuant to 42 U.S.C. § 2000e-2(m) unless she presents direct evidence of discrimination; all other cases, where the plaintiff presents only circumstantial evidence of discrimination, warrant only a "determinative factor" instruction, which is a greater burden of proof.[2]

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[2] Plaintiffs may prove Title VII cases using two differing models, "pretext" and "mixed motives." In the classic "pretext" case, the plaintiff creates an inference of discrimination by proving a prima facie case of discrimination; the employer may rebut that inference by articulating a nondiscriminatory reason for its actions; and plaintiff then has the opportunity to prove that the defendant's reason is not the true reason for the employment decision and that discrimination is. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) and *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248 (1981). It was the general rule prior to the '91 Act that a plaintiff had to show that the discriminatory reason was a determinative or but-for factor in the employment decision if she relied on the pretext formula. See, e.g. *Miller v. Cigna*, 47 F.3d 586 (3rd Cir. 1995); *Ross v. Comstat*, 759 F.2d 355, 365-366 (4th Cir. 1985);

By contrast, in a "mixed-motives" case, the plaintiff did not rely on the inferential analysis of *McDonnell Douglas* because the plaintiff presented direct evidence of discrimination. *Tyler v. Bethlehem Steel Corp*, 958 F.2d 1176, 1181 (2nd Cir.) *cert. denied*, 506 U.S. 826 (1992). Under *Price Waterhouse v. Hopkins*, 490 U.S. 228, 250, 258 (1989) the burden of disproving but-for causation in a mixed motive case shifted to the defendant, who could escape liability if it proved that it would have made the same decision absent consideration of the discriminatory factors.

The district court issued an order that granted Ricoh's motion for judgment as a matter of law and denied all of plaintiffs' motions. App. at 7. In ruling on Ricoh's motion, the district court did not make a finding that there was insufficient evidence to support the jury's finding that sex was a motivating factor, as Ricoh had argued. Instead, the district court held that the jury's verdict that Ricoh would have made the same decision even if it had not considered plaintiffs' gender was equivalent to a finding that the plaintiffs' sex was not a "determinative factor" in Ricoh's actions, and that, therefore, Ricoh did not incur any liability. App. at 20.

Relying on *Fuller*, the district court held that it had erred in using the "motivating factor" standard of liability when it instructed the jury, because the plaintiffs had not presented direct evidence of discrimination in the form of verbal statements of discriminatory animus. Instead, the court concluded, because plaintiffs presented only circumstantial evidence, the jury should have been instructed that it had to decide whether plaintiffs' sex was a determinative factor in Ricoh's decision making, which, the court held, is a but-for standard. The district court further held that the jury's finding that Ricoh would have made the same decision even if the unlawful motive were not present was equivalent to a finding that gender was not a "but-for" or "determinative factor." App. at 9. Accordingly, the district court granted Ricoh's motion for judgment as a matter of law.

Ms. Drew and Ms. Mayo noted a timely appeal to the Fourth Circuit, which affirmed the district court without any legal discussion, finding no reversible error. App. at 6.

REASONS FOR GRANTING THE WRIT

Title VII as amended in 1991 expressly provides that a plaintiff prevails when she "demonstrates that . . . sex . . . was a motivating factor for any employment practice, even though other factors motivated the practice."42 U.S.C. § 2000e-2(m) The decisions below and in *Fuller v. Phipps* are patently inconsistent with this express language. They are, moreover, in direct conflict with decisions in other circuits.

The Circuit Courts of Appeal Are Split in Their Interpretation of This Important Statute

Contrary to the holding of the Fourth Circuit in this case, the Second and Eleventh Circuits, in considering the application of section 42 U.S.C. 2000e-2(m) have ruled that "motivating factor" is the correct standard for liability in all Title VII discrimination cases because of the language of the 1991 Act. In *Harris v. Shelby County Board of Education*, 99 F.3d 1078, 1084 (11th Cir. 1996) where the plaintiff in a Title VII action presented only circumstantial evidence of discrimination, the court held that the plaintiff may receive some relief if he proves that discrimination was one motivating factor behind an adverse employment decision, even if there were other legitimate factors motivating that decision as well. Similarly, in *Fields v. New York State*

Office of Mental Retardation and Developmental Disabilities, 1997 U.S. App. LEXIS 11970 (2nd Cir. May 23, 1997) the Second Circuit held that a Title VII plaintiff who presented only circumstantial evidence of discrimination is entitled to a "motivating factor" jury instruction and "prevails by showing that discrimination was a motivating factor."

Other Circuit Courts of Appeals have not distinguished between direct and circumstantial evidence in applying the "motivating factor" standard of 42 U.S.C. § 2000e-2(m). *Hennessy v. Penril Datacomm Networks, Inc.*, 69 F.3d 1344, 1350-51 (7th Cir. 1995) (affirming jury instructions that applied §2000e-2(m) to a case with both direct and circumstantial evidence: "whether ... sex was a motivating factor in [the] decision to fire [plaintiff] was the ultimate issue."); *Pedigo v. P.A.M. Transport, Inc.* 60 F.3d 1300, 1301 (8th Cir. 1995) (In a case involving circumstantial evidence of discrimination, "an employee is entitled to some relief if he or she proves that his or her disability was a 'motivating factor' in the decision made, 'even though other factors also motivated the employer's decision."); *See also, Woodson v. Scott Paper Co.*, 109 F.3d 913, 935, n. 29 (3rd Cir. 1997) ("... one standard for both mixed motive and pretext cases would be far preferable, and have the additional benefit of simplifying and clarifying employment discrimination law."). *Lam v. University of Hawaii*, 40 F.3d 1551, 1564 n. 24 (9th Cir. 1994) (Under the 1991 Act, "... the employer is liable once the plaintiff shows that a protected characteristic played a motivating part in the employment decision.").

It is significant that all standard published model jury instructions provide "motivating factor" instructions for all Title VII cases. *See*, Edward J. Devitt et al., Federal Jury Practice and Instructions §104.03, §104.04 (4th ed. 1987 & Supp. 1995) American Bar Association Model Jury Instructions for Employment Litigation 1.02[1], 1.02[2]a (1994) Eighth Circuit Manual of Model Civil Jury Instructions §5.01 (1995) None of them provides a different instruction for plaintiffs that present only circumstantial evidence.

It is in the public interest for this honorable Court to resolve the split among the circuits.

The Holding Below Defeats the Plain Purpose of the Statute

The plain language of 42 U.S.C. § 2000e-2(m) prohibits employers from using a plaintiff's sex as a motivating factor in any employment decision:

> . . . an unlawful employment practice is established when the complaining party demonstrates that ... sex ... was a motivating factor for any employment practice, even though other factors also motivated the practice.

Section 2000e-2(m) was intended to eliminate all forms of discrimination in the workplace, even if other issues contributed to adverse employment decisions and even if the employer never articulated the reasons for its actions. It was

the intent of Congress to make the employer liable every time discrimination contributed to an adverse employment decision. The legislative history of the '91 Act confirms that:

> To establish liability . . . the complaining party must establish that discrimination was a "contributing" factor in an employment decision. . . . To establish liability . . . the complaining party must demonstrate that discrimination actually contributed or was otherwise a factor in an employment decision or action.

H.R. Rep. No. 102-40(I), 102d Cong., 1st Sess. 48, reprinted in 1991 U.S.C.C.A.N., Vol. 2, 549, 586. There are no exceptions in Title VII to this standard for establishing liability in a disparate treatment case.[3]

Title VII clearly provides that where, as here, the jury finds that an impermissible factor was a motivating factor but that the defendant would have done the same thing in the absence of plaintiff's sex, the only effect the latter showing has is to limit the prevailing plaintiff's remedies.

> On a claim in which an individual proves a violation under section 2000e-2(m) of this title and a respondent demonstrates that the

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[3] A "disparate treatment" case such as this involves discrimination against an individual because of her race, color, religion, sex, or national origin. 42 U.S.C. § 2000e-2(a). A "disparate impact" case involves an employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin. 42 U.S.C. § 2000e-2(k).

> respondent would have taken the same action in the absence of the impermissible motivating factor, the court--
>
> (i) may grant declaratory relief, injunctive relief ... and attorney's fees and costs demonstrated to be directly attributable only to the pursuit of a claim under 2000e-2(m) of this title; and
>
> (ii) shall not award damages or issue an order requiring any admission, reinstatement, hiring, promotion, or payment, described in subparagraph (A).

42 U.S.C. § 2000e-5(g)(2)(B) *See e.g., Harris v. Shelby County Board of Education*, 99 F.3d at 1084 ("This defense, if proven, effectuates only a limitation on liability, not a complete avoidance of it."); *O'Day v. McDonnell Douglas Helicopter Co.*, 79 F.2d 756, 760 (9th Cir. 1996).

The plain language and purposes of Title VII are completely frustrated if an employer is permitted to evade liability for discriminatory acts merely by demonstrating that other factors also motivated it to take adverse actions against an employee.

The Decision Below Leads to Absurd Results

The decision of the Fourth Circuit, imposing a requirement of direct evidence of discrimination before a plaintiff may be entitled to a "motivating factor" instruction, can and did lead to absurd results. The jury in this case

found that Ricoh discriminated against the plaintiffs because of their gender when it refused to assign them the more lucrative accounts. The Fourth Circuit's requirement that a plaintiff present direct evidence permitted Ricoh to avoid liability merely because Ricoh officials did not make discriminatory comments when they steered the lucrative accounts only to males. Under the rule of law imposed by the Fourth Circuit, some perpetrators of discriminatory acts may escape responsibility so long as they don't say anything.

Nor is there anything in the Civil Rights Act of 1991 that supports the Fourth Circuit's requirement that a plaintiff bear a special evidentiary burden of proving discrimination by direct evidence in order to qualify for a motivating factor instruction. The legislative history makes clear that discriminatory statements in the workplace are assessed "under standards generally applied for weighing the sufficiency of evidence." House Report at 48 (1991 U.S.C.C.A.N. at 586). Congress did not intend that overt discriminatory or stereotypical statements such as those found in *Price Waterhouse*[4] be given special weight or that

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[4] In *Price Waterhouse*, individuals involved in making the partnership decision made remarks about Hopkins that reflected stereotypical views of the proper role of women. These remarks included instructions that in order to improve her chances for partnership, she should "walk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry" 490 US at 235. Another partner had repeatedly commented in previous years "that he could not consider any woman seriously as a partnership candidate and believed that women were not even capable of functioning as senior managers." 490 US at 236.

such statements be prerequisite for a motivating factor instruction. The economic and emotional effects of discrimination are dependent not on the employer's words but upon its actions in limiting opportunities for some members of the workforce because they belong to a protected class. Congress intended that the plaintiff's burden of proof depend on the nature of the discriminatory acts alleged not on whether her employer also made discriminatory statements.

Indeed, the law does not distinguish between proof by direct or indirect evidence. Edward J. Devitt et al., Federal Jury Practice and Instructions §72.03 (4th ed. 1987 & Supp. 1995);[5] *The Robert Edwards*, 19 U.S. (6 Wheat.) 187, 188, 5 L.Ed. 238 (1821). In any event, the only direct evidence of discrimination is testimony of an eyewitness or the perpetrator that the challenged decision was made because of discriminatory motives, and such "smoking guns" seldom are

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[5] The Devitt and Blackmar instruction on direct and indirect evidence provides:

> There are, generally speaking, two types of evidence from which a jury may properly find the truth as to the facts of a case. One is direct evidence – such as the testimony of an eyewitness. The other is indirect or circumstantial evidence – the proof of a chain of circumstances pointing to the existence or non-existence of certain facts.
>
> As a general rule, the law makes no distinction between direct or circumstantial evidence, but simply requires that the jury find the facts in accordance with the preponderance of all the evidence in the case, both direct and circumstantial.

Edward J. Devitt et al., Federal Jury Practice and Instructions §72.03.

found in employment cases. *Visser v. Packer Engineering Associates, Inc.*, 909 F.2d 959, 961 (7th Cir. 1990). Statements that merely reflect discriminatory animus are no more than parts of a chain of circumstantial evidence pointing to intentional discrimination in the employment decision. For example, the fact that a manager may say that he believes that women should not be given equal opportunity is circumstantial evidence that will allow the factfinder to infer that he acted in accordance with that belief, but it does not necessarily compel such an inference.

The Circuit Court's Decision Conflicts With This Court's Holding In Price Waterhouse v. Hopkins

In affirming the district court, the Fourth Circuit approved a holding that conflicts with this Court's holding in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) (plurality opinion) that the employer bears the burden of proving that it would have made the same employment decision in the absence of consideration of plaintiffs' sex. In order to carry that burden the employer has to (1) offer a legitimate and sufficient reason that actually motivated it at the time of the decision; (2) present some objective evidence as to its probable decision in the absence of the impermissible motive; and (3) show that its legitimate reason, standing alone, would have induced it to make the same decision. *Price Waterhouse*, 490 U.S. at 252. (plurality opinion) The Fourth Circuit affirmed the district court despite the fact that

Ricoh did not offer any evidence to satisfy the three-part burden set out by *Price Waterhouse.*[6]

In addition, the *Price Waterhouse* plurality specifically rejected the "but for" test adopted in *Fuller* for a plaintiff to prove discrimination. The *Price Waterhouse* Court cited to Title VII's provision making it illegal for an employer to take employment actions "*because of* such

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[6] Ricoh claimed that it never assigned plaintiffs any DOD accounts because, historically, there had been two sections, one of which serviced DOD accounts and one of which serviced civil accounts. It claimed it was motivated to assign only civil accounts to Ms. Drew and Ms. Mayo because they had been "civil reps" prior to 1990. This historical justification is insufficient as a matter of law. *EEOC v. Steamship Clerk's Union*, 48 F.3d 594, 607 (1st Cir. 1995) *cert. denied*, 133 L.Ed. 2d 27 (1995) (A discriminatory practice "cannot elude the proscriptions of the law merely because its sponsor prefers to retain it."); *Armstrong v. Index Journal Co.*, 647 F.2d 441 (4th Cir. 1981) (classification of salespersons into two categories that performed the same tasks, one of which was almost always female and received lower base pay and less desirable accounts, violates Title VII)

The second motivation Ricoh put forth for its decision not to assign any DOD accounts to Ms. Drew and Ms. Mayo was that reassignment would disrupt long-standing personal sales relationships. This reason also fails because Ricoh did not call anyone to testify that it actually considered alleged disruption of long-standing personal relationships as a factor when it failed to assign any DOD accounts to Ms. Drew and Ms. Mayo during the period 1990-1995. Indeed, there were hundreds of DOD accounts that were never worked at all, so no relationships existed. With respect to the accounts that were worked, the Ricoh managers had no idea what personal relationships existed between the sales representatives and their customers.

individual's ... *sex*." 42 U.S.C. § 2000e-2(a)(1) (emphasis added by the Court). The *Price Waterhouse* Court concluded,

> We take these words to mean that gender must be irrelevant to employment decisions. To construe the words "because of" as colloquial shorthand for "but-for causation," as does [defendant], is to misunderstand them.

490 U.S. 228, 240 (plurality opinion) (emphasis added). To conclude otherwise would require the Court to leave its "common sense at the doorstep." *Id.* at 241. Plaintiff need not show the precise causal role played by illegitimate and legitimate motives. Rather Congress only obligated plaintiff to prove that the "employer relied upon sex-based considerations in coming to its decision." *Id.*

CONCLUSION

Title VII is of great public importance but the Circuit Courts of Appeals are split in their holdings on the plaintiff's burden of proof. The holding below requiring a plaintiff to present direct evidence of discrimination in order to be entitled to a "motivating factor" jury instruction is in the minority. It is in the public interest for this Honorable Court to resolve that split to provide uniformity of construction of this important statute.

The holding below is inconsistent with the language of Title VII and defeats the manifest Congressional purpose in enacting the Civil Rights Act of 1991.

The holding below leads to absurd results and undercuts the enforcement of Title VII.

This Honorable Court should grant certiorari and reverse the holding below.

Respectfully submitted,

Vicki G. Golden
Counsel of Record
Michael G. Kane
CASHDAN & GOLDEN, PLLC
1150 Connecticut Avenue, NW
Suite 900
Washington, DC 20036-4104
(202) 862-4330

Counsel for Petitioner

APPENDIX

No. _____

In The
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October Term 1996

SALLY W. DREW,
JUDY MAYO,

Petitioners,

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RICOH CORPORATION,

Respondent.

APPENDIX

Drew, et al. v. Ricoh Corporation, No. 95-3128
(4th Cir. March 31, 1997).....A-1

Drew, et al. v. Ricoh Corporation, No. 95-269A
(E.D. Va. Nov.7, 1995).....A-7

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

SALLY W. DREW; JUDY MAYO,
Plaintiffs-Appellants,

v.

RICOH CORPORATION,
Defendant-Appellee.

No. 95-3128

Appeal from the United States District Court
for the Eastern District of Virginia, at Alexandria.
James C. Cacheris, Chief Judge.
(CA-95-269-A)

Argued: January 29, 1997

Decided: March 31, 1997

Before MURNAGHAN, NIEMEYER, and MOTZ, Circuit Judges.

Affirmed by unpublished per curiam opinion.

COUNSEL

ARGUED: Vicki Greene Golden, CASHDAN & GOLDEN, Washington, D.C., for Appellants. Joel L. Finger, ROBERTS & FINGER, L.L.P., New York, New York, for Appellee. **ON BRIEF:** Michael G. Kane, CASHDAN & GOLDEN, Washington, D.C., for Appellants. Jean L. Schmidt, ROBERTS & FINGER, L.L.P., New York, New York, for Appellee.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

OPINION

PER CURIAM:

Defendant-Appellee Ricoh Corporation ("Ricoh") manufactures and sells various types of office equipment, including digital facsimile ("fax") systems. Plaintiffs-Appellants Sally Drew and Judy Mayo (collectively, the "Plaintiffs") worked in Ricoh's Washington, D.C. branch office (the "D.C. branch") as sales account executives.

The D.C. branch is currently divided into three sales divisions: commercial and federal government copier sales, commercial fax sales, and federal government fax sales. The federal government fax sales division sells "Securefax" machines and regular commercial fax machines to agencies of the federal government and to the primary federal contractors to those agencies (the "prime contractors"). Securefax machines connect to government encryption equipment and ensure the security of fax transmissions. Commercial fax machines do not have this capability. Ricoh Securefax machines cost, on average, two to four times more than Ricoh commercial fax machines.

Prior to April 1990, the federal government fax sales division in the D.C. branch consisted of two separate departments: the Securefax sales department and the civil government sales department. The Securefax sales department sold Ricoh Securefax machines and commercial fax machines to Department of Defense ("DOD") agencies, such as the Army, Navy, and Air Force (the "DOD accounts"). The Securefax sales department also sold Securefax machines to prime contractors. The civil government sales department, where the Plaintiffs worked, sold Securefax machines and commercial fax machines to civil agencies of the federal government (the "civil agency accounts"). Account executives in the civil government sales department sold exclusively to civil government agencies and did not sell to DOD agencies. The civil government sales account executives received the same base salary and commission rates as the Securefax

sales account executives. However, because Securefax machines cost more than commercial fax machines, and because DOD agencies purchase more Securefax machines than civil government agencies, account executives in the Securefax sales department earned substantially more in total commissions than the account executives in the civil government sales department.

In April 1990, Ricoh decided to consolidate the civil government sales department and the Securefax sales department into one federal government fax sales division. At that time, there were three account executives in each department: Ted Morgan, Richard Tackels, and Robert Johnson in the Securefax sales department, and David Parrish and the two Plaintiffs in the civil government sales department. The Plaintiffs were the only women account executives in the new consolidated division.

David Shaver served as manager of the entire federal government fax sales division. Shaver laid Parrish off, and Ralph Bennie, the former manager of the civil government sales department, replaced him and became an account executive in the new division. Bennie took over the existing civil agency accounts that had been assigned to Parrish. Tackels, Morgan, and Johnson, the former Securefax sales account executives, continued to service the same DOD accounts that they had served before the consolidation, and the Plaintiffs, the former civil government sales account executives, continued to service the same civil agency accounts.

In March 1991, Ricoh promoted Shaver to D.C. branch director, and Johnson became the new manager of the consolidated federal government fax sales division. When Ricoh promoted Johnson to manager, it required him to give up thirty percent of his accounts in order to attend to his new management responsibilities. Johnson assigned a few of his prime contractor accounts and four of his DOD accounts to Bennie. Even with those DOD accounts, however, Bennie continued to earn less than the Plaintiffs.

In March 1992, Bennie retired. Ricoh hired Martin Hickey in April 1992 to replace Bennie. Ricoh assigned Hickey all of Bennie's accounts, including the four DOD accounts, five of Morgan's and Tackles's DOD accounts, and one of Plaintiff Mayo's civil agency

accounts. Hickey, however, earned less than either of the Plaintiffs, even though he had several DOD accounts.

Following the April 1990 merger of the two departments, the Plaintiffs made repeated requests to Shaver and Johnson to receive DOD accounts, pointing out that every male account executive in the division had DOD accounts. Each time, however, Shaver and Johnson refused their requests. In November 1993, the two Plaintiffs, Hickey, and Morgan filed an internal complaint with Ricoh about "account structure." The complaint alleged that the two Plaintiffs and Hickey earned less than the account executives who served DOD accounts. The Plaintiffs also alleged that Ricoh discriminated against them on the basis of sex in assigning the DOD accounts.

In December 1993, Hickey resigned from Ricoh. Ricoh decided not to replace Hickey, and it assigned Hickey's civil agency accounts to the Plaintiffs and his DOD accounts to Johnson. Ricoh contends that the Plaintiffs told the corporation that they did not want Hickey's DOD accounts. The Plaintiffs, however, contend that Ricoh's human resources department promised them that all of Hickey's accounts would be distributed to the Plaintiffs, but that Ricoh refused to do so.

On May 6, 1994, the Plaintiffs filed a sex discrimination charge with the City of Alexandria Office of Human Rights (the "Alexandria Commission"). The Alexandria Commission determined that no probable cause existed to believe that Ricoh discriminated against either of the Plaintiffs on the basis of sex.

On March 1, 1995, the Plaintiffs filed an employment discrimination action against Ricoh under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C.A. §§ 2000e to 2000e-17 (West 1994 & Supp. 1996), in the Eastern District of Virginia. They claimed that Ricoh had discriminated against them since 1990 on the basis of sex by refusing to assign them any DOD accounts. The case proceeded to a jury trial on October 10-13, 1995. At the close of all of the evidence, the district court gave the jury a "mixed-motive" instruction.*

*The district court advised the jury, in pertinent part, as follows:

> In order for the plaintiffs . . . to recover on their claim against Ricoh, . . . plaintiffs must prove that defendant intentionally dis-

The verdict form that the court gave to the jury mirrored the court's instruction. The verdict form provided, in pertinent part:

> 1. Have Plaintiffs proved that plaintiffs' sex was, more likely than not, a motivating factor in the decision of Defendant not to distribute DOD accounts to the Plaintiffs[?]
>
> . . . .
>
> 2. Would Ricoh more likely than not have made the same employment decision concerning the Plaintiffs even if unlawful motive, namely plaintiffs' sex, was not present?

Ricoh objected to the instruction and verdict form, and it argued that the court should give a "but for" instruction. The court denied Ricoh's objection.

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criminated against plaintiff[s]; that is, plaintiffs' sex must be proven to have been a motivating factor in defendant's decision not to assign the [DOD] accounts to plaintiffs.

. . . In showing the plaintiffs' sex was a motivating factor, plaintiffs are not required to prove that sex was the sole motivation or even the primary motivation for defendant's decision. Plaintiff need[ ] only prove that sex played a part in defendant's decision, even though other factors may also have motivated the defendant.

If you find from the evidence that sex is more likely than not a motivating factor in defendant's employment decision, not to assign DOD accounts, you should . . . so indicate on the verdict form.

. . . .

If you find the Defendant Ricoh would have more likely than not made the same employment decision not to assign DOD accounts concerning plaintiffs, even if an unlawful motive was not present, you should so indicate on the verdict form.

Plaintiffs . . . must show the defendant Ricoh intentionally discriminated against them. Plaintiffs, however, are not required to produce direct evidence of intentional discrimination. Intentional discrimination may be inferred from the existence of other facts.

The jury returned the verdict form on October 13, 1995 and answered both questions in the affirmative. That is, the jury found that the Plaintiffs' sex was a motivating factor in Ricoh's decision not to assign them DOD accounts, but that Ricoh would have made the same employment decision regardless of their sex. The district court then entered judgment for Ricoh.

The Plaintiffs and Ricoh filed post-trial motions. Ricoh moved for judgment as a matter of law on question one of the verdict form on the ground that substantial evidence did not support a finding that the Plaintiffs' sex was a motivating factor in Ricoh's actions. The Plaintiffs moved to alter or amend the judgment. The Plaintiffs also filed a motion for judgment as a matter of law on question two of the verdict form on the ground that substantial evidence did not support a finding that Ricoh would have made the same employment decision regardless of the Plaintiffs' sex. In the alternative, the Plaintiffs moved for a new trial on question two. Relying on *Fuller v. Phipps*, 67 F.3d 1137 (4th Cir. 1995), the district court granted Ricoh's motion for judgment as a matter of law on question one of the verdict form and denied all of the Plaintiffs' motions.

We have reviewed all of the arguments that the Plaintiffs raised in their briefs and at oral argument, and we find no reversible error. Accordingly, we affirm for the reasons sufficiently expressed in the district court's thorough opinion. *See Drew v. Ricoh Corp.*, Civil No. 95-269-A (E.D. Va. Nov. 7, 1995).

AFFIRMED

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA

Alexandria Division

SALLY W. DREW JUDY MAYO,	)	
	)	
Plaintiffs	)	CA No. 95 269A
	)	
v.	)	
	)	
RICOH CORPORATION,	)	
	)	
Defendant	)	

MEMORANDUM OPINION

On October 13, 1995, a jury returned a verdict in favor of Defendant Ricoh Corporation in Plaintiffs' Sally W. Drew and Judy Mayo's employment discrimination case under Title VII of the Civil Rights Act, 42 U.S.C. § 2000e et seq.

Now this matter is before the Court on three separate, but related motions: 1) Defendant Ricoh Corporation ("Defendant") seeks judgment as a matter of law pursuant to Rule 50(b) of the Federal Rules of Civil Procedure; 2) Plaintiffs' Sally Drew and Judy Mayo ("Plaintiffs") seek judgment as a matter of law pursuant t Rule 50(b), or in the alternative, a new trial pursuant to Rule 59(a) of the Federal Rules of Civil Procedure; and 3) Plaintiffs' seek to amend the Judgment entered on October 13, 1995, and request

declaratory and injunctive relief pursuant to the Civil Rights Act of 1991, 42 U.S.C. § 2000e-5(g) (2) (B) (i).

I.

On November 3, 1995, this Court took all motions under advisement after being presented with a very recent Fourth Circuit Court of Appeals decision concerning employment discrimination under 42 U.S.C. § 1981 and Title VII of the Civil Rights Act, 42 U.S.C. § 2000e et seq. See Fuller v. Phipps, No. 95-1036, 1995 U.S. App. LEXIS 30754 (4th Cir. October 25, 1995).

In light of the Fourth Circuit's opinion in Fuller v. Phipps, supra, and for the reasons that follow, the Court **GRANTS** Defendant's renewed motion for judgment as a matter of law as to Verdict Form Question Number 1; **Denies** Plaintiffs' motion for judgment as a matter of law; and alternatively **DENIES** Plaintiff's motion for a new trial, as to Verdict Form Question Number 2; and **DENIES** Plaintiffs' motion to alter or amend Judgment and for equitable relief.

After a three-day jury trial was held on Plaintiffs' Title VII sex discrimination claim, the jury rendered its verdict on October 13, 1995. The jury found that Plaintiffs' sex was, more likely than not, a motivating factor in the decision of Defendant not to distribute Department of Defense ("DOD") accounts to Plaintiffs. The jury also found that Defendant, more likely than not, would have made the same employment decision concerning the Plaintiffs even if the unlawful motive, that is, Plaintiffs' sex, was not present.

Plaintiffs were not awarded any damages and a judgment was entered for the Defendant and against the Plaintiffs. Both parties to this matter submitted the above-mentioned motions as a result of the jury's verdict.

II.

Federal Rule of Civil Procedure 50(a) (1) allows the Court to enter judgment as a matter of law on any issue when "there is no legally sufficient evidentiary basis for a reasonable jury to have found for that party with respect to that issue." In ruling on a motion for judgment as a matter of law pursuant to Fed. R. Civ. P. 50 (b),

> the trial court must consider the record as a whole and in the light most favorable to the party opposed to the motion. If there is substantial evidence opposed to the motion, that is, evidence of such quality and weight that reasonable and fair-minded men in the exercise of impartial judgment could reasonably return a verdict for the nonmoving party, the motion should be denied. . . .

Wyatt v. Interstate & Ocean Transport Co., 623 F.2d 888, 891 (4th Cir. 1980); see also Demaine v. Bank One, 904 F.2d 219, 220 (4th Cir. 1990) (per curiam); Godfrey v. Boddie-Noell Enterprises, Inc., 843 F. Supp. 114, 119 (E.D. Va. 1994), aff'd, 46 F.3d 114 (4th Cir. 1995).

Accordingly, judgment as a matter of law is proper, "'when, without weighing the credibility of the evidence, there can be but one reasonable conclusion as to the proper

judgment.'" Singer v. Duncan, 45 F.3d 823, 827 (4th Cir. 1995) (quoting 5A James W. Moore, Moore's Federal Practice, § 50.07[2], at 50-76 (2d ed. 1994). Significantly, "[t]he movant is entitled to judgment as a matter of law 'if the nonmoving party failed to make a showing on an essential element of his case with respect to which he had the burden of proof.'" Singer, 45 F.3d at 827 (citing Bryan v. James E. Holmes Regional Medical Ctr., 33 F.3d 1318, 1333 (11th Cir. 1994).

III.

a. Defendant's Renewed Motion for Judgment as a Matter of Law

On November 3, 1995, the Defendant brought to the Court's attention the Fourth Circuit's most recent pronouncement on the important distinction between mixed-motive and pretext cases concerning employment discrimination. See Fuller v. Phipps, supra.

In Fuller, the Fourth circuit affirmed the refusal of the district court to give a mixed-motive jury instruction, where only a pretextual case of discrimination had been proven at trial. In reaching this conclusion, the Fourth Circuit held that a plaintiff seeking a mixed-motive instruction must present direct evidence necessary to establish a mixed-motive case entitling them to such an instruction.

In the instant case, the Court gave the jury a mixed motive instruction. Immediately after the jury was instructed, counsel for Defendant noted their objection to the mixed-motive instruction. Instead, counsel for Defendant

stated that the "but for" test was more appropriate for a case like the instant case. (Transcript 3 ("T.3"), at pp. 280-83). However, defense counsel did not bring this objection to the court's attention earlier during the charge conference. (Id. At 281). Still, the Court noted the Defendant's exception for the record. (Id. At 283).

Based on the evidence presented at trial, giving a mixed-motive instruction was error. Only those plaintiffs "who satisfy the evidentiary burden entitling them to mixed-motive treatment can qualify for an instruction under section 107 [of the Civil Rights Act of 1991, codified at 42 U.S. C. § 2000e-2(m)]."[1] Fuller, supra, at *13. Plaintiffs' did not present sufficiently direct evidence of discrimination in order to qualify for the more advantageous standards of liability applicable in mixed-motive cases. Consequently, Plaintiffs were not entitled to a mixed-motive instruction under Section 107, and it was error for this Court to so instruct the jury.

In order to earn a mixed motive instruction in accordance with the standards set forth in Section 107, " a plaintiff must satisfy the evidentiary burden necessary to make out a mixed-motive case . . . [which requires] 'direct evidence that decisionmakers placed substantial negative reliance on an illegitimate criterion.'" Fuller, supra, at *7-8 (quoting Price Waterhouse v. Hopkins, 490 U.S. 228, 277 (1989) (O'Connor, J., concurring).

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[1] An instruction under Section 107 of the Civil Rights Act of 1991 reads: "an unlawful employment practice is established when the complaining party demonstrates that sex . . was a motivating factor for any employment practice, even though other factors also motivated the practice."

Moreover, "'not all evidence that is probative of discrimination will entitle the plaintiff to a [mixed-motive] charge.'" Fuller, supra, at *8 (quoting Ostrowski v. Atlantic Mut. Ins. Cos., 968 F.2d 171, 181 (2d Cir. 1992)); see also Schleriniger v. Des Moines Water Works, 925 F.2d 1100, 1101 (8th Cir. 1991) ("Simply because a discriminatory reason might be inferred from a prima facie case does not mean that a mixed motive case exists."). Rather, what is required instead is "evidence of conduct or statements that both reflect directly the alleged discriminatory attitude and that bear directly on the contested employment decision." Fuller, supra, at *8 (citing Ostrowski, 968 F.2d at 182; Starceski v. Westinghouse Elec. Corp., 54 F.3d 1089, 1096 (3d Cir. 1995); and Radabaugh v. Zip Feed Mills, Inc., 997 F.2d 444, 449 (8th Cir. 1993)).

The record is barren of any direct evidence put forth by Plaintiffs' that evinced the Defendant placing substantial negative reliance on Plaintiffs' sex. Moreover, the record is devoid of any evidence of conduct or statements that both reflect directly Defendant's alleged discriminatory attitude and that bear directly on Defendant's decision not to distribute DOD accounts to Plaintiffs.

Simply because Plaintiffs' allege that they possessed the requisite qualifications does not merit a mixed-motive charge. See Ostrowski, 968 F.2d at 182. Moreover, even if the Plaintiffs' were treated differently in the disbursement of DOD accounts, there was no evidence demonstrating that this was directly on account of their gender.

Most importantly, at the November 3, 1995 hearing, counsel for Plaintiff conceded the fact that Plaintiffs' did not prove any direct evidence of unlawful discrimination. Further, throughout the course of this case, Plaintiffs' have consistently maintained that their claim of discrimination has always been a disparate treatment claim. It is well understood that pretext cases, as opposed to mixed-motive cases, represent the typical disparate treatment action. Fuller, supra, at *5.

In the instant case, the court finds that giving the jury the mixed-motive instruction was harmless error pursuant to Rule 61 of the Federal Rules of Civil Procedure. This error did not affect the substantial rights of the parties because the jury was given the following instruction:

> If you find the Defendant Ricoh would have more likely than not made the same employment decision not to assign DOD accounts concerning Plaintiffs, even if an unlawful motive was not present, you should so indicate on the verdict form.

(T.3 at 270:5-10).

The jury answered "yes" Verdict Form Question Number 2, which stated:

> Would Ricoh more likely than not have made the same employment decision concerning the Plaintiffs even if [ ] unlawful motive, namely Plaintiffs' sex, was not present?

For all practical purposes, this charge essentially restates the "but for" instruction which is synonymous with a charge focusing on "a determining factor." See EEOC v. Clay Printing Co., 955 F.2d 936, 940-41 (4th Cir. 1992. Because the jury answered "yes," it essentially found that Plaintiffs' sex was not a determining factor in Defendant's employment decision not to distribute DOD accounts to the Plaintiffs.

Consequently, a sufficient jury instruction was given in this case in order for the jury to ultimately conclude that Plaintiffs' sex was not the determining factor in Defendant's decision not to distribute DOD accounts to the Plaintiffs. Stated differently, the jury ultimately concluded that Plaintiffs' did not establish that but for the fact that Plaintiffs' were female, they would have been distributed DOD accounts.

Keeping in mind that judgment as a matter of law is proper, "'when, without weighing the credibility of the evidence, there can be but one reasonable conclusion as to the proper judgment,'" see Duncan, supra, 45 F.3d at 827 (quoting Moore's Federal Practice, § 50.07[2], at 50-76), it is the opinion of the Court that the jury came to the only reasonable conclusion in this pretextual discrimination case by answering "yes" to Verdict Form Question Number 2.

Accordingly, Defendant's motion for judgment as a matter of law is **GRANTED**. This determination by the Court renders the Plaintiffs' motion to alter and amend the judgment and for equitable relief moot. Even if the Court had denied Defendant's renewed motion for judgment as a

matter of law, the Court would have **DENIED** Plaintiffs motion to alter and amend the judgment and for equitable relief.

b. Plaintiffs' Motion for Judgment as Matter of Law, or in the Alternative, for a New Trial

Plaintiffs seek judgment as a matter of law on the question of whether Defendant carried its burden of proving that it would have made the same employment decision in the absence of the impermissible factor, that is, Plaintiffs' sex. In the alternative, Plaintiffs request a new trial as to this one issue.

In a disparate treatment case, such as this one, the proper analysis is found in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), and Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981), and as refined in St. Mary's Honor Ctr. V. Hicks, __ U.S. __, 113 S.Ct. 2742 (1993). In pretext case, the plaintiff seeks to prove that the defendant's proffered legitimate reasons for employment action was, in reality, a pretext for a sexually motivated decision.

The legal standards which allocate the evidentiary burdens in a Title VII disparate treatment case are:

> 'First, the plaintiff has the burden of proving by a preponderance of the evidence a prima facie case of discrimination. Second, if the plaintiff succeeds in proving the prima facie case, the burden shifts to the defendant "to

> articulate some legitimate, non discriminatory reason for the employee's rejection."

Ballinger v. North Carolina Agr. Extension Service, 815 F.2d 1001, 1005 (4th Cir.), cert. denied, 404 U.S. 897 (1987) (citing Burdine, 450 U.S. at 253) (quoting McDonnell Douglas, 411 U.S. at 802-04)).

However, after the defendant comes forward with their reasons, the jury decides "the ultimate question, whether the plaintiff[s] have proven 'that the defendant intentionally discriminated against them.'" Hicks, __ U.S. at __, 113 S. Ct. at 2749 (citing Burdine, 450 U.S. at 253).

Moreover, "[t]hroughout, the plaintiff retains the ultimate burden of persuasion." Fuller, supra, at *5. In order to establish a prima facie case of employment discrimination based on gender,

> [plaintiff] must have demonstrated, by a preponderance of the evidence, that she was a member of a protected class who was qualified for an available position but was rejected under circumstances giving rise to an inference of unlawful discrimination.

Ballinger, 815 F.2d at 1005 (citing Burdine, 450 U.S. at 253).

In the instant case, assuming the jury found that both Plaintiff and Defendant satisfied their evidentiary obligations, the fact remains that the jury found that Plaintiffs' sex was not the determinative factor in Defendant's decision not to distribute DOD accounts to the Plaintiffs. This is so because the jury answered Verdict From Question Number 2 in the

affirmative, which means that the jury believed the Defendant would have made the same employment decision concerning the Plaintiffs' even if the unlawful motive, Plaintiffs' sex, was not present.

The evidence in the record clearly shows that the Defendant would not have reallocated accounts and equalized earning potential even if Plaintiffs were male. By Plaintiffs own admission, Mr. Martin Hickey, a male civil government account executive, was not given an opportunity to earn as much as account representatives who sold to the Army, Navy and Air Force. (Mayo, T.1 a 298:20 – 299:17); (Drew, T.1 at 201:8-12).

Moreover, Plaintiff Drew also admitted that their complaint concerning account allocation, and subsequent earning potential, applied with as much force to Mr. Hickey as it did to them. (Drew, T.1 at 198:8 – 201:7; T.1 at 299:20 – 300:13).

Consequently, from such evidence a jury could reasonably conclude that even if Plaintiffs were male, the Defendant would still have made the same employment decision. This was precisely what the jury's verdict reflected in answering Verdict Form Question Number 2 as it did.

Further proof of Defendant's legitimate, nondiscriminatory factors in deciding not to reallocate accounts to equalize the earning potential of the account executives, is the evidence that it was a good business practice to allow account representatives to maintain major accounts in order to foster established sales relationships.

(Shaver, T.2 at 68.12 – 70:8); (Johnson, T.3 at 102:12 – 105:2); (Graske, T.2 at 226:4-12).

The jury could reasonably have concluded that the Defendant legitimately strove to maintain consistent business relationships, instead of disrupting major accounts by frequently replacing account executives, and facing a possible loss of its core business accounts. Moreover, even Plaintiff Drew testified that developing a business relationship with the people who purchase your equipment is beneficial because the customer grows to trust the account representative, and it enhances the representative's ability to sell. (Drew, T.1 at 169:13 – 170:5). Plaintiff Drew also testified that, as a general rule, it would be irresponsible for the Defendant to take away a major account from an established account executive and give it to someone else. (Id. At 205:1-20).

The jury found that the Defendant would have made the same employment decision concerning the Plaintiffs even if the unlawful motive, Plaintiffs' sex, was not present. Thus, the jury found that Plaintiffs' sex, was not present. Thus, the jury found that Plaintiffs' sex was not the determining factor in its decision not to distribute DOD accounts to the Plaintiffs. Rather, Defendant's decision was predicted on sound business judgment in order to maintain consistent business relationships. Consequently, the Defendant presented legally sufficient evidence to support the jury's finding that the Defendant would not have distributed DOD accounts to equalize Plaintiffs' earnings even if they had been male.

Accordingly, for the reasons expressed above, Plaintiffs' motion for a judgment as a matter of law is **DENIED**.

Plaintiff asks, in the alternative, for a new trial on the sole issue of whether the Defendant would not have distributed DOD accounts to equalize Plaintiffs earnings in the absence of the impermissible factor.

In interpreting Rule 59(a) of the Federal Rules of Civil Procedure, the Fourth Circuit court of Appeals has stated that:

> A trial judge has a duty to set aside a verdict and grant a new trial even though it is supported by substantial evidence if he is of the opinion that the verdict is against the clear weight of the evidence, or is based upon evidence which is false or will result in miscarriage of justice.

Wyatt v. Interstate & Ocean Transport. Co., 623 F.2d 888, 891-92 (4th Cir. 1980); see also Whalen v. Roanoke County Bd. Of Supervisors, 769 F. 2d 221, 226 (4th Cir. 1985) ("[t]he court should exercise its discretion to grant a new trial 'whenever, in its judgment, this action is required in order to prevent injustice.'") (citation omitted); Gill v. Rollins Protective Services, 836 F.2d 194, 196 (4th Cir. 1987).

The jury's verdict reflects the fact that the Defendant would have made the same employment decision not to distribute DOD accounts to equalize Plaintiffs' earnings even if the impermissible motive was not present. The Court finds

that the verdict of the jury is not against the clear weight of the evidence, is not based upon false evidence, and will not result in a miscarriage of justice.

Accordingly, Plaintiffs' motion for a new trial is **DENIED**.

November 7, 1995
Alexandria, Virginia

James C. Cacheris
United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA

Alexandria Division

SALLY W. DREW JUDY MAYO,	)	
	)	
Plaintiffs	)	CA No. 95 269A
	)	
v.	)	
	)	
RICOH CORPORATION,	)	
	)	
Defendant	)	

ORDER

For the reasons stated in the accompanying Memorandum Opinion, it is hereby **ORDERED** that:

Defendant's renewed motion for judgment as a matter of law as to Verdict Form Question Number 1 is **GRANTED**;

Plaintiffs' motion for judgment as a matter of law as to Verdict Form Question Number 2 is **DENIED**;

In the alternative, Plaintiffs' motion for a new trial as to Verdict Form Question Number 2 is **DENIED**; and

Plaintiffs' motion to alter or amend judgment and for equitable relief is **DENIED**.

The Clerk is directed to send a copy of this Order to all counsel of record.

November 7, 1995
Alexandria, Virginia

James C. Cacheris
UNITED STATES
DISTRICT JUDGE

Supreme Court, U.S.
FILED
JUL 29 1997
CLERK

No. 97-13

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

SALLY W. DREW, JUDY MAYO,

Petitioners,

vs.

RICOH CORPORATION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

JOEL L. FINGER
Counsel of Record
ROBERTS & FINGER, LLP
767 Third Avenue
New York, New York 10010
(212) 308-1900

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COUNTER STATEMENT OF QUESTIONS PRESENTED

1. Whether the Fourth Circuit Court of Appeals was correct in affirming the judgment of the District Court that Petitioners failed to present legally sufficient evidence of sex discrimination to warrant a "mixed-motive" jury instruction?

2. Whether the Fourth Circuit Court of Appeals was correct in affirming the judgment of the District Court that, even if Petitioners were entitled to a "mixed-motive" jury instruction, Respondent was entitled to judgment as a matter of law because Petitioners failed to present legally sufficient evidence that their sex was a motivating factor in the contested employment decision?

PARTIES

1. Petitioner Sally W. Drew is an employee of Ricoh Corporation.

2. Petitioner Judy Mayo is an employee of Ricoh Corporation.

3. Respondent Ricoh Corporation is an "employer" within the meaning of Title VII, 42 U.S.C. § 2000e(b). Ricoh Corporation has the following parent companies and subsidiaries:

a. *Parents*

Ricoh Company, Ltd.

b. *Subsidiaries*

AOE Ricoh, Inc. (formerly American Office Equipment Co., Inc.)

Gestetner Corporation

Imagetech Ricoh, Inc. (formerly Nivas Business Corp. d/b/a Imagetech)

Imagetech Credit Corporation

Ricoh Canada, Inc. (formerly Savin Canada, Inc.)

Ricoh Electronics, Inc.

Ricoh Finance Corporation

Ricoh Latin America, Inc. (formerly Gestetner Regional Services, Inc.)

Savin Corporation (formerly SC Acquisition Corp.)

Selective Ricoh, Inc. (formerly Selective Business Systems, Inc.)

Supplies Hotline Corporation

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No. 97-13

IN THE

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OCTOBER TERM, 1997

SALLY W. DREW, JUDY MAYO,

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Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent respectfully prays that the petition for a writ of *certiorari* to review the judgment of the United States Court of Appeals for the Fourth Circuit entered on March 31, 1997 be denied.

OPINIONS BELOW

The Opinion of the Court of Appeals affirming the District Court's judgment is attached hereto beginning at page 1A of the Appendix. The Order and Opinion of the District Court is

attached hereto beginning at page 8A of the Appendix. The decisions below were not officially reported.

STATUTES INVOLVED

1. Section 703 of Title VII of the Civil Rights Act of 1964 provides:

> (a) It shall be an unlawful employment practice for an employer -
>
> > (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-2(a)(1).

2. Section 107 of the Civil Rights Act of 1991 provides:

> Except as otherwise provided in this subchapter, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.

42 U.S.C. § 2000e-2(m).

3. 42 U.S.C. § 2000e-5(g)(2)(B) provides:

> On a claim in which an individual proves a violation under section 2000e-2(m) of this title and a respondent demonstrates that the respondent would have taken the same action in the absence of the impermissible motivating factor, the court -
>
> (i) may grant declaratory relief, injunctive relief (except as provided in clause (ii)), and

> attorneys' fees and costs demonstrated to be directly attributable only to the pursuit of a claim under section 2000e-2(m) of this title; and
>
> (ii) shall not award damages or issue an order requiring any admission, reinstatement, hiring, promotion, or payment, described in subparagraph (A).

42 U.S.C. § 2000e-5(g)(2)(B).

STATEMENT OF THE CASE

A. Nature of the Case

This is an employment discrimination action under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e, *et seq*. ("Title VII"). Petitioners were employed by Respondent Ricoh Corporation ("Respondent" or "Ricoh") as account executives selling facsimile ("fax") machines to government agencies. (Pg. 2A.) Prior to April 1990, Petitioners worked in the department responsible for selling fax machines to civil government agencies. Another department was responsible for selling fax machines to Department of Defense ("DOD") agencies, including the Army, Navy and Air Force. (*Id.*) Since DOD agencies generally purchased a greater number of fax machines, and more expensive types of fax machines, than civil agencies, the account executives who sold to the major DOD accounts generally earned higher commissions than the account executives who sold to civil agency accounts. (Pg. 2A-3A.)

In April 1990, Ricoh made an administrative change which placed both of these fax departments under the supervision of the same manager. (Pg. 3A.) This change did not affect Ricoh's account structure, and the government fax account executives continued to sell to the same types of accounts to which they had sold previously. (Pg. 3A-4A.) In the action below, Petitioners claimed that when Ricoh placed the civil and DOD departments under one manager, it had an affirmative legal obligation to undertake a reallocation of its sales

accounts (including breaking up major accounts and disrupting established sales relationships) in order to equalize the earnings potential of all the government fax account executives. (Pg. 4A.) Petitioners asserted that Ricoh's failure to make this global account reallocation constituted unlawful discrimination against them because of their sex in violation of Title VII. (*Id.*)

B. Proceedings Below

Petitioners filed their complaint on March 1, 1995 in the United States District Court for the Eastern District of Virginia. (Pg. 4A.) A jury trial was held on October 10-13, 1995, during which Petitioners presented evidence and were fully heard on the issues relating to their claim. (*Id.*) At the close of all the evidence and before the case was submitted to the jury, Respondent moved for judgment as a matter of law pursuant to Fed.R.Civ.P. 50(a) on the ground that there was insufficient evidence for the jury to find that Petitioners were discriminated against because of their sex. The District Court reserved decision on the motion and submitted the action to the jury subject to a later determination of the legal questions raised by Respondent's motion. The District Court then proceeded to charge the jury.

In its jury charge, the District Court gave the jury what is known in Title VII parlance as a "mixed-motive" instruction. (Pg. 4A-5A.) The Form of Verdict given to the jury mirrored this instruction:

> 1. Have Plaintiffs proved that Plaintiffs' sex was, more likely than not, a motivating factor in the decision of Defendant not to distribute DOD accounts to the Plaintiffs[?]
>
> 2. Would Ricoh more likely than not have made the same employment decision concerning the Plaintiffs even if unlawful motive, namely Plaintiffs' sex, was not present?

(*Id.*) Respondent objected to that instruction, and argued that a "determining factor" instruction should have been given

because Petitioners had proceeded under a pure "pretext" theory and there had been no evidence presented to support a "mixed-motive" theory. (Pg. 5A, 10A-11A.) The District Court overruled Respondent's objection but noted the objection for the record. (*Id.*) The District Court proceeded to give the "mixed-motive" instruction. (Pg. 4A-5A.)

The jury answered both questions in the affirmative. That is, it found that Petitioners' sex was more likely than not a motivating factor in the employment decision, but that Ricoh would have made the same employment decision concerning the Petitioners regardless of their sex. (Pg. 6A.) Petitioners were not awarded any damages or other relief, and judgment was entered for Respondent and against Petitioners. (*Id.*)

Thereafter, both parties filed post-trial motions. Respondent moved pursuant to Fed.R.Civ.P. 50(a) for judgment as a matter of law as to the jury's finding on Question No. 1 of the mixed-motive charge on the ground that there was insufficient evidence to support a finding that Petitioners' sex was a motivating factor in Ricoh's actions. (Pg. 6A.) Petitioners moved to amend the judgment to reflect a verdict in their favor, for judgment as a matter of law on Question No. 2 of the mixed-motive charge (on which the jury had ruled in Respondent's favor), and for a new trial. (*Id.*)

Shortly before oral argument on the post-trial motions, the Fourth Circuit Court of Appeals issued its opinion in *Fuller v. Phipps*, 67 F.3d 1137 (4th Cir. 1995), holding that a "mixed-motive" jury instruction (such as the one given by the District Court here) should be given only where the plaintiff has presented sufficient evidence that the employer placed "substantial negative reliance" on an illegitimate criteria. 67 F.3d at 1142-43. The *Fuller* Court held that evidence justifying a "mixed-motive" instruction would include "evidence of conduct or statements that both directly reflect the alleged discriminatory attitude and that bear directly on the contested employment decision." (*Id.*) Based on *Fuller* and the trial evidence, the District Court concluded that Petitioners had not presented sufficient evidence to warrant a "mixed-motive"

instruction, and that the "determining factor" instruction applicable in pretext cases should have been given to the jury. (Pg. 6A, 8A-14A.) However, the District Court held this to be harmless error, primarily because the second prong of the mixed-motive instruction given to the jury (*i.e.*, whether Respondent would have made the same decision regardless of Petitioners' sex), "essentially restates the 'but for' instruction which is synonymous with a charge focusing on 'a determining factor.'" (Pg. 14A.) The District Court reasoned that, since the jury had expressly found that Respondent would have made the same decision regardless of Petitioners' sex, Petitioners had failed to meet their Title VII burden of proving that they were discriminated against because of their sex. (*Id.*)

Furthermore, based on its own independent review of the evidence, the District Court concluded that Petitioners had failed to present legally sufficient evidence from which a reasonable jury could find that their sex was even a motivating factor in Respondent's employment decision, and, therefore, that Respondent was entitled to judgment as a matter of law in any event. (Pg. 14A, 17A-18A.) Accordingly, the District Court granted Respondent's motion for judgment as a matter of law as to Question No. 1 of the mixed-motive charge. (Pg. 8A, 14A-15A.) The District Court further held that, even if it did not grant judgment as a matter of law in favor of Respondent as to Question No. 1 of the mixed-motive charge, it would not have awarded Petitioners equitable relief (*i.e.*, declaratory or injunctive relief, attorneys' fees, or costs) within its discretion under 42 U.S.C. § 2000e-5(g)(2)(b). (Pg. 14A-15A.) The District Court denied Petitioners' post-trial motions. (Pg. 15A-20A.) An appropriate Order was entered by the District Court on November 7, 1995. (Pg. 21A.) Petitioners then appealed. After undertaking a *de novo* review of the record and applying the appropriate legal standards, the Fourth Circuit Court of Appeals on March 31, 1997 issued a *per curiam* opinion affirming the District Court's judgment in all respects. (Pg. 1A-6A.) Petitioners' subsequent motion for reargument and rehearing *en banc* was denied. Petitioners filed a petition for a writ of *certiorari* in this Court on June

30, 1997. Respondent received a copy of the petition on June 30, 1997.

ARGUMENT

THE PETITION FOR CERTIORARI SHOULD BE DENIED

This employment discrimination case under Title VII does not involve any special, important or novel legal issues warranting Supreme Court review. Both the District Court and the Fourth Circuit Court of Appeals applied the appropriate legal standards and burdens of proof for evaluating employment discrimination claims, as enunciated by this Court in *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502 (1993); *Hazen Paper Co. v. Biggins*, 507 U.S. 604 (1993); *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989); *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248 (1981); and *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). Further, the decisions of the District Court and the Court of Appeals comport with the decisions of the other Circuit Courts of Appeals with respect to the applicable law.

A. The Courts of Appeals Uniformly Distinguish Between "Pretext" and "Mixed-Motive" Discrimination Cases, and Require Plaintiffs to Satisfy an Evidentiary Threshold Before Giving a "Mixed-Motive" Jury Instruction

Petitioners assert that 42 U.S.C. § 2000e-2(m) eliminated the legal distinction between "pretext" cases and "mixed motive" cases traditionally recognized by courts in employment discrimination cases, and that Title VII plaintiffs are now automatically entitled to a "mixed motive" jury instruction in every case. (Petition for Writ of *Certiorari* at 7-14.) Petitioners further assert that this case is appropriate for Supreme Court review because there is a split in the Circuits regarding this issue. (*Id.*)

Contrary to Petitioners' assertion, there is no split among the Courts of Appeals regarding the applicability of a "mixed-motive" jury instruction under 42 U.S.C. § 2000e-2(m). After

the passage of the Civil Rights Act of 1991 (the "1991 Act"), the Courts of Appeals have properly continued to recognize the evidentiary distinction between "pretext" and "mixed-motive" discrimination cases.[1] Further, the Courts of Appeals that have addressed the issue have uniformly held that discrimination plaintiffs are not automatically entitled to a "mixed-motive" instruction in every case; rather, before qualifying for such an instruction, there must be sufficient evidence to support a reasonable inference that: (1) permissible and forbidden motives co-existed, and (2) the employer actually considered an illegitimate criterion in reaching the contested employment decision. Thus, courts in discrimination cases continue to engage in a threshold determination as to whether the nature of the evidence presented justifies a "mixed-motive" or "pretext" analysis by the jury, and then instruct the jury accordingly.

For example, in *Fields v. New York State Office of Mental Retardation and Developmental Disabilities*, 115 F.3d 116 (2d Cir. 1997), a Title VII case, the Second Circuit affirmed the District Court's refusal to give a "mixed-motive" jury instruction on the basis of the evidence presented at trial. The Second Circuit discussed the differences between "pretext" cases and "mixed-motive" cases, and held that the nature of the evidence must support a "mixed-motive" theory before a "mixed-motive" instruction can be given:

> [W]e must bear in mind a distinction that underlies all Title VII cases, and, indeed, all cases in which the adverse action is alleged to have been taken for an impermissible reason -- the distinction between single motive and dual (or multiple) motive cases. In most cases involving a discrimination claim, the

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[1] This Court has implicitly recognized that this distinction remains viable after the 1991 Act, and that 42 U.S.C. § 2000e-2(m) is applicable only to those cases where there is an evidentiary basis for a "mixed-motive" analysis. *See Landgraf v. USI Film Products*, 511 U.S. 244 (1994) (stating that 42 U.S.C. § 2000e-2(m) "responds to *Price Waterhouse* . . . by setting forth standards *applicable in 'mixed motive' cases.*") (Emphasis added).

plaintiff alleges that the adverse action . . . was taken because of an impermissible reason, such as race, ethnic origin, or gender, and the defendant denies improper motivation and asserts that it acted for a permissible reason. In some cases, however, even if the plaintiff succeeds in proving motivation based on an impermissible reason, the defendant advances the contention that it would have taken the same adverse action for a permissible reason. . . .

Cases in the first category are often called "pretext cases," because the plaintiff usually challenges the defendant's proffered assertion of a permissible reason as a pretext for the impermissible reason of discrimination. . . . Cases in the second category are appropriately called "dual issue motivation cases" because the fact-finder must decide both the issue of whether the plaintiff has proved that an impermissible reason motivated the adverse action and the additional issue of whether the defendant has proved that it would have taken the same action for a permissible reason.

Over the plaintiff's objection, the Magistrate Judge declined to submit the case to the jury as a dual motivation case. Specifically, Judge DiBianco rejected both Field's argument that the 1991 Civil Rights Act abolished the distinction between dual motivation and pretext cases, and his argument that, even if the distinction survived the 1991 Act, he presented sufficiently compelling evidence to entitle him to a dual motivation charge under the governing case law in this Circuit.

* * *

We have emphasized . . . that *for a plaintiff to be able to insist on a dual motivation charge, there must either be direct evidence of discrimination, or circumstantial evidence that is "tied directly to the alleged discriminatory animus. . . ."*

> We have also noted that, in some cases, *a dual motivation charge would be inappropriate where, on the particular evidence, no reasonable trier of fact could find that two motives could have simultaneously co-existed. . . . A dual motivation charge should be given only where the available evidence supports a reasonable inference that "permissible and forbidden motives co-existed," and not where the evidence supports only a finding that "there was either unlawful motivation or lawful motivation, but not both."*
>
> * * *
>
> *We reject Field's reading of the 1991 Act as requiring a dual motivation charge in every Title VII case. . . .*
>
> * * *
>
> *[T]he distinction between "dual motivation" and "substantial motivation" jury instructions survives the 1991 Act.*

Id. at 119-24 (emphasis added) (citations omitted). The *Fields* Court held that the district court's refusal to give a "mixed-motive" or "dual motivation" instruction was appropriate because the plaintiff had failed to present either direct evidence of discrimination, or circumstantial evidence tied directly to the alleged discriminatory animus. *Id.* at 124. *See also Luciano v. Olsten Corp.*, 110 F.3d 210, 218-19 (2d Cir. 1997) (recognizing distinction between "pretext" and "mixed-motive" cases under Title VII, and affirming district court's decision to use "determining factor" jury instruction in "pretext" case); *Calabritto v. Dillon*, 1997 U.S. App. LEXIS 3331 (2d Cir. Feb. 21, 1997) (affirming district court's discretion not to analyze Title VII case under "mixed motive" framework); *Hargett v. National Westminster Bank, USA*, 78 F.3d 836, 840-41 (2d Cir.) (same), *cert. denied*, _ U.S. _, 117 S.Ct. 84 (1996).

In *Starceski v. Westinghouse Elec. Corp.*, 54 F.3d 1089 (3d Cir. 1995), the Third Circuit recognized the evidentiary distinction between "pretext" and "mixed-motive" cases, and held that the type of jury instruction given depends on the nature of the evidence presented at trial:

> Before submitting the case to the jury, the district court determined that Starceski provided sufficient direct evidence to support a claim of age-based disparate treatment requiring a *Price Waterhouse*, or so-called "mixed-motives" instruction, rather than a *McDonnell Douglas/Burdine* pretext instruction. . . . [A] "mixed-motives" theory of employment discrimination requires "conduct or statements by persons involved in the decisionmaking process that may be viewed as directly reflecting the alleged discriminatory attitude."
>
> * * *
>
> We believe . . . that the distinction between a *Price Waterhouse* and a *McDonnell Douglas/Burdine* case lies in the kind of proof an employee produces on the issue of bias. In the former, direct evidence of discriminatory animus leads not only to a ready logical inference of bias, but also to a rational presumption that the person expressing bias acted on it. . . . A pretext case is different. It depends on circumstantial evidence allowing the factfinder to infer that the falsity of the employer's explanation shows bias.

54 F.3d at 1097-98 (citations omitted). *See also Woodson v. Scott Paper Co.*, 109 F.3d 913, 920 (3d Cir. 1997) (standards of proof in Title VII case "will vary depending on whether the suit is characterized as a 'pretext' suit or a 'mixed-motives' suit."); *Mardell v. Harleysville Life Ins. Co.*, 31 F.3d 1221, 1225 n. 6 (3d Cir. 1994) (discussing different "evidentiary regimes" in "pretext" and "mixed-motive" cases), *vacated and remanded on other grounds*, _ U.S. _, 115 S.Ct. 1397 (1995).

In *Hennessy v. Penril Datacom Networks, Inc.*, 69 F.3d 1344 (7th Cir. 1995), the Seventh Circuit similarly recognized that the determination of whether to instruct the jury under a "mixed-motive" or "indirect evidence" methodology depends upon the nature of the evidence produced by the plaintiff. In affirming the district court's decision to use a "mixed-motive" instruction, the Court stated:

> In denying Penril's motion for judgment as a matter of law at the close of plaintiff's case, *the district court found the case to be a "mixed bag" of direct and indirect evidence*. Contrary to Penril's assertion, the trial court did not analyze this case solely as an indirect evidence case subject to the *McDonnell Douglas* burden-shifting methodology. And Hennessy did not -- correctly, we believe -- argue for a proposed jury instruction using the *McDonnell Douglas* indirect evidence methodology. She proceeded instead by attempting to prove intentional discrimination based on her gender and pregnancy through direct evidence. *A review of the record reveals ample evidence of discriminatory intent by Penril which is direct evidence of discrimination.* . . ."

69 F.3d at 1350 (emphasis added). *See also Gleason v. Mesirow Financial, Inc.*, 1997 U.S. App. LEXIS 15508 (7th Cir. June 25, 1997) (discussing distinctions between "pretext" and "mixed-motive" case under Title VII); *Hunt-Golliday v. Metropolitan Water Reclamation Dist.*, 104 F.3d 1004, 1010-11 (7th Cir. 1997) (affirming district court's decision, based on nature of evidence, to analyze claim using *McDonnell Douglas* indirect method of proof rather than "mixed-motive" method).

The Eighth, Ninth and Tenth Circuits are in accord with the above decisions. *See Ballard v. Albright*, 1996 U.S. App. LEXIS 1029, *3 (8th Cir. Jan. 26, 1996) ("We reject [plaintiff's] argument that the district court erred in failing to apply a "mixed-motives" analysis to his case, because

[plaintiff] did not present enough evidence of a discriminatory component to meet the threshold showing required for such an analysis."), *cert. denied*, _ U.S. _, 117 S.Ct. 53 (1996); *Berg v. Bruce*, 112 F.3d 322, 327-28 (8th Cir. 1997) (plaintiff's "failure to present any specific factual evidence showing age animus . . . is fatal to her claim that this case should be analyzed as a mixed motives case. . . ."); *Thomas v. First Nat'l Bank of Wynne*, 111 F.3d 64, 65-66 (8th Cir. 1997) (mixed motive analysis inappropriate absent evidence "showing a specific link between the alleged discriminatory animus and the challenged decision, sufficient to support a finding . . . that an illegitimate criterion actually motivated" the decision); *Board v. Children's Hosp. of Los Angeles*, 1996 U.S. App. LEXIS 25312, *9-10 (9th Cir. Sept. 24, 1996) (plaintiff failed to present sufficiently direct evidence to support a "mixed-motive" theory under Title VII); *Richard v. California Inst. of Technology*, 1996 U.S. App. LEXIS 19965 (9th Cir. Aug. 5, 1996) (rejecting Title VII plaintiff's attempt to establish claim under a "mixed-motive" theory where evidence did not support assertion that employment decision was product of mixed motives); *Washington v. Garrett*, 10 F.3d 1421, 1432 n.15 (9th Cir. 1994) (district court must determine whether mixed motive approach is viable based on the evidence); *Thomas v. Denny's, Inc.*, 111 F.3d 1506, 1512 (10th Cir. 1997) (discrimination plaintiff is entitled to "mixed-motive" jury instruction only upon proper evidentiary showing); *Steiber v. Journal Publishing Co.*, 1996 U.S. App. LEXIS 27359 (10th Cir. Oct. 21, 1996) ("[T]he district court did not err in refusing to give an instruction implicating the mixed motive theory, because . . . there was no direct evidence of retaliation.").

Thus, contrary to Petitioners' contention, there is no split among the Circuit Courts of Appeals regarding the applicability of a "mixed-motive" jury instruction after the passage of the 1991 Act. The Second, Third, Fourth, Seventh, Eighth, Ninth and Tenth Circuits all hold that the distinction between "pretext" and "mixed-motive" cases was not eliminated by the

1991 Act, and that discrimination plaintiffs are not automatically entitled to a "mixed-motive" instruction in every case.[2] The Fourth Circuit's decision in *Fuller v. Phipps*, 67 F.3d 1137 (4th Cir. 1995), which was relied upon by the District Court and Court of Appeals in this case, is consistent with the decisions of the other Courts of Appeals that have addressed this issue in holding that plaintiffs must present sufficient evidence of discrimination directly relating to the contested employment decision before a "mixed-motive" instruction will be given.3 Petitioners have not cited a single Court of Appeals decision holding that the 1991 Act requires a "mixed-motive" jury instruction in all cases. The Courts of Appeals' interpretations of the 1991 Act in this regard have been consistent. Accordingly, Respondent respectfully

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[2] *Harris v. Shelby County Bd. of Ed.*, 99 F.3d 1078 (11th Cir. 1996), cited by Petitioners, is not to the contrary. In *Harris*, a summary judgment decision, the Eleventh Circuit held that a "mixed-motive" approach would be appropriate because, although the plaintiff had not produced evidence disputing the employer's proffered nondiscriminatory reasons, he produced evidence of a discriminatory statement made by a decisionmaker that directly related to the contested employment decision. 99 F.3d at 1084-86.

[3] Petitioners' assertion that *Fuller* requires "direct" evidence in the form of an overtly discriminatory statement or writing is incorrect. Like the decisions of other Courts of Appeals, *Fuller* requires evidence that, in reaching the contested decision, the employer "placed substantial negative reliance on an illegitimate criterion." 67 F.3d at 1142. Such evidence would include "evidence of *conduct or* statements that both reflect directly the alleged discriminatory attitude and that bear directly on the contested employment decision." *Id.* (emphasis added). Thus, for purposes of a mixed-motive analysis, the term "direct evidence" (which is taken from Justice O'Connor's opinion in *Price Waterhouse*, 490 U.S. at 277) has been interpreted more broadly than Petitioners suggest. Courts of Appeals have interpreted *Price Waterhouse* as requiring direct or circumstantial evidence "tied directly to the alleged discriminatory animus" or that could "fairly be said to 'directly reflect' the alleged unlawful basis." *See Hook v. Ernst & Young*, 28 F.3d 366, 374 (3d Cir. 1994); *Griffiths v. CIGNA Corp.*, 988 F.2d 457, 470 (3d Cir.), *cert. denied*, 510 U.S. 865 (1993); *Ostrowski v. Atlantic Mutual Ins. Cos.*, 968 F.2d 171, 181 (2d Cir. 1992).

submits that the issues presented by Petitioners are not appropriate for Supreme Court review.

B. This Case Is Not Appropriate For Review Because the Courts Below Held That Petitioners Failed to Present Legally Sufficient Evidence That Their Sex Was Even a Motivating Factor in the Contested Decision

Even if the issues posed by Petitioners warranted Supreme Court review, this is not an appropriate case for considering those issues because the District Court, after independently reviewing the evidence in the record, held that Petitioners had not presented legally sufficient evidence to support a finding that their sex was a motivating factor in the contested employment decision. The District Court granted Respondent's motion for judgment as a matter of law pursuant to Fed.R.Civ.P. 50(a) as to Question No. 1 of the mixed motive instruction -- *i.e.*, whether Petitioners proved that their sex was, more likely than not, a motivating factor in the decision of Respondent not to distribute DOD accounts to Petitioners. (Pg. 8A, 21A.) The Court of Appeals affirmed that determination after conducting a *de novo* review of the evidence. (Pg. 6A.) Judgment as a matter of law in favor of Respondent on that question was properly entered because there was insufficient evidence to conclude that Petitioners' sex was taken into account with respect to Ricoh's employment decisions. Thus, in this particular case, even if Petitioners were entitled to a "mixed-motive" jury instruction pursuant 42 U.S.C. § 2000e-2(m), there was no evidence to support a finding in their favor under such an instruction.

CONCLUSION

For the reasons set forth herein, Respondent respectfully requests that the petition for a writ of *certiorari* to review the decision of the Fourth Circuit Court of Appeals be denied in its entirety.

Dated: July 28, 1997

Respectfully submitted,

JOEL L. FINGER
Counsel of Record
ROBERTS & FINGER, LLP
Attorneys for Respondent
767 Third Avenue
New York, New York 10017
(212) 308-1900

APPENDIX

Appendix

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

SALLY W. DREW; JUDY MAYO,
Plaintiffs-Appellants,
v.
RICOH CORPORATION,
Defendant-Appellee.

No. 95-3128

Appeal from the United States District Court
for the Eastern District of Virginia, at Alexandria.
James C. Cacheris, Chief Judge.
(CA-95-269-A)

Argued: January 29, 1997

Decided: March 31, 1997

Before MURNAGHAN, NIEMEYER, and MOTZ, Circuit Judges.

Affirmed by unpublished per curiam opinion.

COUNSEL

ARGUED: Vicki Greene Golden, CASHDAN & GOLDEN, Washington, D.C., for Appellants. Joel L. Finger, ROBERTS & FINGER, L.L.P., New York, New York, for Appellee. **ON BRIEF:** Michael G. Kane, CASHDAN & GOLDEN, Washington, D.C., for Appellants. Jean L. Schmidt, ROBERTS & FINGER, L.L.P., New York, New York, for Appellee.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

OPINION

PER CURIAM:

Defendant-Appellee Ricoh Corporation ("Ricoh") manufactures and sells various types of office equipment, including digital facsimile ("fax") systems. Plaintiffs-Appellants Sally Drew and Judy Mayo (collectively, the "Plaintiffs") worked in Ricoh's Washington, D.C. branch office (the "D.C. branch") as sales account executives.

The D.C. branch is currently divided into three sales divisions: commercial and federal government copier sales, commercial fax sales, and federal government fax sales. The federal government fax sales division sells "Securefax" machines and regular commercial fax machines to agencies of the federal government and to the primary federal contractors to those agencies (the "prime contractors"). Securefax machines connect to government encryption equipment and ensure the security of fax transmissions. Commercial fax machines do not have this capability. Ricoh Securefax machines cost, on average, two to four times more than Ricoh commercial fax machines.

Prior to April 1990, the federal government fax sales division in the D.C. branch consisted of two separate departments: the Securefax sales department and the civil government sales department. The Securefax sales department sold Ricoh Securefax machines and commercial fax machines to Department of Defense ("DOD") agencies, such as the Army, Navy, and Air Force (the "DOD accounts"). The Securefax sales department also sold Securefax machines to prime contractors. The civil government sales department, where the Plaintiffs worked, sold Securefax machines and commercial fax machines to civil agencies of the federal government (the "civil agency accounts"). Account executives in the civil government sales department sold exclusively to

civil government agencies and did not sell to DOD agencies. The civil government sales account executives received the same base salary and commission rates as the Securefax sales account executives. However, because Securefax machines cost more than commercial fax machines, and because DOD agencies purchase more Securefax machines than civil government agencies, account executives in the Securefax sales department earned substantially more in total commissions than the account executives in the civil government sales department.

In April 1990, Ricoh decided to consolidate the civil government sales department and the Securefax sales department into one federal government fax sales division. At that time, there were three account executives in each department: Ted Morgan, Richard Tackels, and Robert Johnson in the Securefax sales department, and David Parrish and the two Plaintiffs in the civil government sales department. The Plaintiffs were the only women account executives in the new consolidated division.

David Shaver served as manager of the entire federal government fax sales division. Shaver laid Parrish off, and Ralph Bennie, the former manager of the civil government sales department, replaced him and became an account executive in the new division. Bennie took over the existing civil agency accounts that had been assigned to Parrish. Tackels, Morgan, and Johnson, the former Securefax sales account executives, continued to service the same DOD accounts that they had served before the consolidation, and the Plaintiffs, the former civil government sales account executives, continued to service the same civil agency accounts.

In March 1991, Ricoh promoted Shaver to D.C. branch director, and Johnson became the new manager of the consolidated federal Government fax sales division. When Ricoh promoted Johnson to Manager, it required him to give up thirty percent of his accounts in order to attend to his new management responsibilities. Johnson assigned a few of his prime contractor accounts and four of his DOD accounts to

Bennie. Even with those DOD accounts, however, Bennie continued to earn less than the Plaintiffs.

In March 1992, Bennie retired. Ricoh hired Martin Hickey in April 1992 to replace Bennie. Ricoh assigned Hickey all of Bennie's accounts, including the four DOD accounts, five of Morgan's and Tackles's DOD accounts, and one of Plaintiff Mayo's civil agency accounts. Hickey, however, earned less than either of the Plaintiffs, even though he had several DOD accounts.

Following the April 1990 merger of the two departments, the Plaintiffs made repeated requests to Shaver and Johnson to receive DOD accounts, pointing out that every male account executive in the division had DOD accounts. Each time, however, Shaver and Johnson refused their requests. In November 1993, the two Plaintiffs, Hickey, and Morgan filed an internal complaint with Ricoh about "account structure." The complaint alleged that the two Plaintiffs and Hickey earned less than the account executives who served DOD accounts. The Plaintiffs also alleged that Ricoh discriminated against them on the basis of sex in assigning the DOD accounts.

In December 1993, Hickey resigned from Ricoh. Ricoh decided not to replace Hickey, and it assigned Hickey's civil agency accounts to the Plaintiffs and his DOD accounts to Johnson. Ricoh contends that the Plaintiffs told the corporation that they did not want Hickey's DOD accounts. The Plaintiffs, however, contend that Ricoh's human resources department promised them that all of Hickey's accounts would be distributed to the Plaintiffs, but that Ricoh refused to do so.

On May 6, 1994, the Plaintiffs filed a sex discrimination charge with the City of Alexandria Office of Human Rights (the "Alexandria Commission"). The Alexandria Commission determined that no probable cause existed to believe that Ricoh discriminated against either of the Plaintiffs on the basis of sex.

On March 1, 1995, the Plaintiffs filed an employment discrimination action against Ricoh under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C.A. §§ 2000e to 2000e-17 (West 1994 & Supp. 1996), in the Eastern District of Virginia. They claimed that Ricoh had discriminated against them since 1990 on the basis of sex by refusing to assign them any DOD accounts. The case proceeded to a jury trial on October 10–13, 1995. At the close of all of the evidence, the district court gave the jury a "mixed-motive" instruction.* The verdict form that the court gave to the jury mirrored the court's instruction. The verdict form provided, in pertinent part:

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* The district court advised the jury, in pertinent part, as follows:

> In order for the plaintiffs . . . to recover on their claim against Ricoh . . . plaintiffs must prove that defendant intentionally discriminated against plaintiff[s]; that is, plaintiffs' sex must be proven to have been a motivating factor in defendant's decision not to assign the [DOD] accounts to plaintiffs.
>
> . . . In showing the plaintiffs' sex was a motivating factor, plaintiffs are not required to prove that sex was the sole motivation or even the primary motivation for defendant's decision. Plaintiff need[ ] only prove that sex played a part in defendant's decision, even though other factors may also have motivated the defendant.
>
> If you find from the evidence that sex is more likely than not a motivating factor in defendant's employment decision, not to assign DOD accounts, you should . . . so indicate on the verdict form.
>
> . . . .
>
> If you find the Defendant Ricoh would have more likely than not made the same employment decision not to assign DOD accounts concerning plaintiffs, even if an unlawful motive was not present, you should so indicate on the verdict form.
>
> Plaintiffs . . . must show the defendant Ricoh intentionally discriminated against them. Plaintiffs, however, are not required to produce direct evidence of intentional discrimination. Intentional discrimination may be inferred from the existence of other facts.

> 1. Have Plaintiffs proved that plaintiffs' sex was, more likely than not, a motivating factor in the decision of Defendant not to distribute DOD accounts to the Plaintiffs[?]
>
> . . . .
>
> 2. Would Ricoh more likely than not have made the same employment decision concerning the Plaintiffs even if unlawful motive, namely plaintiffs' sex, was not present?

Ricoh objected to the instruction and verdict form, and it argued that the court should give a "but for" instruction. The court denied Ricoh's objection.

The jury returned the verdict form on October 13, 1995 and answered both questions in the affirmative. That is, the jury found that the Plaintiffs' sex was a motivating factor in Ricoh's decision not to assign them DOD accounts, but that Ricoh would have made the same employment decision regardless of their sex. The district court then entered judgment for Ricoh.

The Plaintiffs and Ricoh filed post-trial motions. Ricoh moved for judgment as a matter of law on question one of the verdict form on the ground that substantial evidence did not support a finding that the Plaintiffs' sex was a motivating factor in Ricoh's actions. The Plaintiffs moved to alter or amend the judgment. The Plaintiffs also filed a motion for judgment as a matter of law on question two of the verdict form on the ground that substantial evidence did not support a finding that Ricoh would have made the same employment decision regardless of the Plaintiffs' sex. In the alternative, the Plaintiffs moved for a new trial on question two. Relying on *Fuller v. Phipps*, 67 F.3d 1137 (4th Cir. 1995), the district court granted Ricoh's motion for judgment as a matter of law on question one of the verdict form and denied all of the Plaintiffs' motions.

We have reviewed all of the arguments that the Plaintiffs raised in their briefs and at oral argument, and we find no

reversible error. Accordingly, we affirm for the reasons sufficiently expressed in the district court's thorough opinion. *See Drew v. Ricoh Corp.*, Civil No. 95-269-A (E.D. Va. Nov. 7, 1995).

AFFIRMED

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA

Alexandria Division

SALLY W. DREW	)	
JUDY MAYO,	)	
	)	
Plaintiffs	)	CA No. 95 269A
	)	
v.	)	
	)	
RICOH CORPORATION,	)	
	)	
Defendant	)	
	)	

MEMORANDUM OPINION

On October 13, 1995, a jury returned a verdict in favor of Defendant Ricoh Corporation in Plaintiffs' Sally W. Drew and Judy Mayo's employment discrimination case under Title VII of the Civil Rights Act, 42 U.S.C. § 2000e *et seq.*

Now this matter is before the Court on three separate, but related motions: 1) Defendant Ricoh Corporation ("Defendant") seeks judgment as a matter of law pursuant to Rule 50(b) of the Federal Rules of Civil Procedure; 2) Plaintiffs' Sally Drew and Judy Mayo ("Plaintiffs") seek judgment as a matter of law pursuant to Rule 50(b), or in the alternative, a new trial pursuant to Rule 59(a) of the Federal Rules of Civil Procedure; and 3) Plaintiffs' seek to amend the Judgment entered on October 13, 1995, and request declaratory and injunctive relief pursuant to the Civil Rights Act of 1991, 42 U.S.C. § 2000e-5(g) (2) (B) (i).

I.

On November 3, 1995, this Court took all motions under advisement after being presented with a very recent Fourth Circuit Court of Appeals decision concerning employment discrimination under 42 U.S.C. § 1981 and Title VII of the Civil Rights Act, 42 U.S.C. § 2000e *et seq. See Fuller v.*

Phipps, No. 95-1036, 1995 U.S. App. LEXIS 30754 (4th Cir. October 25, 1995).

In light of the Fourth Circuit's opinion in *Fuller v. Phipps*, *supra*, and for the reasons that follow, the Court **GRANTS** Defendant's renewed motion for judgment as a matter of law as to Verdict Form Question Number 1; **DENIES** Plaintiffs' motion for judgment as a matter of law; and alternatively **DENIES** Plaintiffs' motion for a new trial, as to Verdict Form Question Number 2; and **DENIES** Plaintiffs' motion to alter or amend Judgment and for equitable relief.

After a three-day jury trial was held on Plaintiffs' Title VII sex discrimination claim, the jury rendered its verdict on October 13, 1995. The jury found that Plaintiffs' sex was, more likely than not, a motivating factor in the decision of Defendant not to distribute Department of Defense ("DOD") accounts to Plaintiffs. The jury also found that Defendant, more likely than not, would have made the same employment decision concerning the Plaintiffs even if the unlawful motive, that is, Plaintiffs' sex, was not present.

Plaintiffs were not awarded any damages and a judgment was entered for the Defendant and against the Plaintiffs. Both parties to this matter submitted the above-mentioned motions as a result of the jury's verdict.

II.

Federal Rule of Civil Procedure 50(a) (1) allows the Court to enter judgment as a matter of law on any issue when "there is no legally sufficient evidentiary basis for a reasonable jury to have found for that party with respect to that issue." In ruling on a motion for judgment as a matter of law pursuant to Fed. R. Civ. P. 50 (b),

> the trial court must consider the record as a whole and in the light most favorable to the party opposed to the motion. If there is substantial evidence opposed to the motion, that is, evidence of such quality and weight that reasonable and fair-minded men in the exercise of impartial judgment could

> reasonably return a verdict for the nonmoving party, the motion should be denied. . . .

Wyatt v. Interstate & Ocean Transport Co., 623 F.2d 888, 891 (4th Cir. 1980); *see also Demaine v. Bank One*, 904 F.2d 219, 220 (4th Cir. 1990) *(per curiam)*; *Godfrey v. Boddie-Noell Enterprises, Inc.*, 843 F. Supp. 114, 119 (E.D. Va. 1994), *aff'd*, 46 F.3d 114 (4th Cir. 1995).

Accordingly, judgment as a matter of law is proper, "'when, without weighing the credibility of the evidence, there can be but one reasonable conclusion as to the proper judgment.'" *Singer v. Duncan*, 45 F.3d 823, 827 (4th Cir. 1995) (quoting 5A James W. Moore, *Moore's Federal Practice*, § 50.07[2], at 50–76 (2d ed. 1994). Significantly, "[t]he movant is entitled to judgment as a matter of law 'if the nonmoving party failed to make a showing on an essential element of his case with respect to which he had the burden of proof.'" *Singer*, 45 F.3d at 827 (citing *Bryan v. James E. Holmes Regional Medical Ctr.*, 33 F.3d 1318, 1333 (11th Cir. 1994).

III.

a. Defendant's Renewed Motion for Judgment as a Matter of Law

On November 3, 1995, the Defendant brought to the Court's attention the Fourth Circuit's most recent pronouncement on the important distinction between mixed-motive and pretext cases concerning employment discrimination. *See Fuller v. Phipps, supra.*

In *Fuller*, the Fourth circuit affirmed the refusal of the district court to give a mixed-motive jury instruction, where only a pretextual case of discrimination had been proven at trial. In reaching this conclusion, the Fourth Circuit held that a plaintiff seeking a mixed-motive instruction must present direct evidence necessary to establish a mixed-motive case entitling them to such an instruction.

In the instant case, the Court gave the jury a mixed motive instruction. Immediately after the jury was instructed, counsel for Defendant noted their objection to the mixed-motive instruction. Instead, counsel for Defendant stated that the "but for" test was more appropriate for a case like the instant case. (Transcript 3 ("T.3"), at pp. 280–83). However, defense counsel did not bring this objection to the court's attention earlier during the charge conference. (*Id.* at 281). Still, the Court noted the Defendant's exception for the record. (*Id.* at 283).

Based on the evidence presented at trial, giving a mixed-motive instruction was error. Only those plaintiffs "who satisfy the evidentiary burden entitling them to mixed-motive treatment can qualify for an instruction under section 107 [of the Civil Rights Act of 1991, codified at 42 U.S.C. § 2000e-2(m)]."[1] *Fuller*, *supra*, at *13. Plaintiffs' did not present sufficiently direct evidence of discrimination in order to qualify for the more advantageous standards of liability applicable in mixed-motive cases. Consequently, Plaintiffs were not entitled to a mixed-motive instruction under Section 107, and it was error for this Court to so instruct the jury.

In order to earn a mixed motive instruction in accordance with the standards set forth in Section 107, "a plaintiff must satisfy the evidentiary burden necessary to make out a mixed-motive case . . . [which requires] 'direct evidence that decisionmakers placed substantial negative reliance on an illegitimate criterion.'" *Fuller, supra*, at *7–8 (quoting *Price Waterhouse v. Hopkins*, 490 U.S. 228, 277 (1989) (O'Connor, J., concurring).

Moreover, "'not all evidence that is probative of discrimination will entitle the plaintiff to a [mixed-motive] charge.'" *Fuller*, *supra*, at *8 (quoting *Ostrowski v. Atlantic Mut. Ins. Cos.*, 968 F.2d 171, 181 (2d Cir. 1992)); *see also Schleniniger*

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[1] An instruction under Section 107 of the Civil Rights Act of 1991 reads: "an unlawful employment practice is established when the complaining party demonstrates that sex . . . was a motivating factor for any employment practice, even though other factors also motivated the practice."

v. Des Moines Water Works, 925 F.2d 1100, 1101 (8th Cir. 1991) ("Simply because a discriminatory reason might be inferred from a prima facie case does not mean that a mixed motive case exists."). Rather, what is required instead is "evidence of conduct or statements that both reflect directly the alleged discriminatory attitude and that bear directly on the contested employment decision." *Fuller*, *supra*, at *8 (citing *Ostrowski*, 968 F.2d at 182; *Starceski v. Westinghouse Elec. Corp.*, 54 F.3d 1089, 1096 (3d Cir. 1995); and *Radabaugh v. Zip Feed Mills, Inc.*, 997 F.2d 444, 449 (8th Cir. 1993)).

The record is barren of any direct evidence put forth by Plaintiffs' that evinced the Defendant placing substantial negative reliance on Plaintiffs' sex. Moreover, the record is devoid of any evidence of conduct or statements that both reflect directly Defendant's alleged discriminatory attitude and that bear directly on Defendant's decision not to distribute DOD accounts to Plaintiffs.

Simply because Plaintiffs' allege that they possessed the requisite qualifications does not merit a mixed-motive charge. *See Ostrowski*, 968 F.2d at 182. Moreover, even if the Plaintiffs' were treated differently in the disbursement of DOD accounts, there was no evidence demonstrating that this was directly on account of their gender.

Most importantly, at the November 3, 1995 hearing, counsel for Plaintiff conceded the fact that Plaintiffs' did not prove any direct evidence of unlawful discrimination. Further, throughout the course of this case, Plaintiffs' have consistently maintained that their claim of discrimination has always been a disparate treatment claim. It is well understood that pretext cases, as opposed to mixed-motive cases, represent the typical disparate treatment action. *Fuller, supra*, at *5.

In the instant case, the court finds that giving the jury the mixed-motive instruction was harmless error pursuant to Rule 61 of the Federal Rules of Civil Procedure. This error did not

affect the substantial rights of the parties because the jury was given the following instruction:

> If you find the Defendant Ricoh would have more likely than not made the same employment decision not to assign DOD accounts concerning Plaintiffs, even if an unlawful motive was not present, you should so indicate on the verdict form.

(T.3 at 270:5–10).

The jury answered "yes" Verdict Form Question Number 2, which stated:

> Would Ricoh more likely than not have made the same employment decision concerning the Plaintiffs even if [ ] unlawful motive, namely Plaintiffs' sex, was not present?

For all practical purposes, this charge essentially restates the "but for" instruction which is synonymous with a charge focusing on "a determining factor." *See EEOC v. Clay Printing Co.*, 955 F.2d 936, 940–41 (4th Cir. 1992. Because the jury answered "yes," it essentially found that Plaintiffs' sex was not a determining factor in Defendant's employment decision not to distribute DOD accounts to the Plaintiffs.

Consequently, a sufficient jury instruction was given in this case in order for the jury to ultimately conclude that Plaintiffs' sex was not the determining factor in Defendant's decision not to distribute DOD accounts to the Plaintiffs. Stated differently, the jury ultimately concluded that Plaintiffs' did not establish that but for the fact that Plaintiffs' were female, they would have been distributed DOD accounts.

Keeping in mind that judgment as a matter of law is proper, "'when, without weighing the credibility of the evidence, there can be but one reasonable conclusion as to the proper judgment,'" *see Duncan*, *supra*, 45 F.3d at 827 (quoting Moore's Federal Practice, § 50.07[2], at 50–76), it is the opinion of the Court that the jury came to the only reasonable

conclusion in this pretextual discrimination case by answering "yes" to Verdict Form Question Number 2.

Accordingly, Defendant's motion for judgment as a matter of law is **GRANTED**. This determination by the Court renders the Plaintiffs' motion to alter and amend the judgment and for equitable relief moot. Even if the Court had denied Defendant's renewed motion for judgment as a matter of law, the Court would have **DENIED** Plaintiffs motion to alter and amend the judgment and for equitable relief.

b. Plaintiffs' Motion for Judgment as Matter of Law, or in the Alternative, for a New Trial

Plaintiffs seek judgment as a matter of law on the question of whether Defendant carried its burden of proving that it would have made the same employment decision in the absence of the impermissible factor, that is, Plaintiffs' sex. In the alternative, Plaintiffs request a new trial as to this one issue.

In a disparate treatment case, such as this one, the proper analysis is found in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), and *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248 (1981), and as refined in *St. Mary's Honor Ctr. V. Hicks*, __ U.S. __, 113 S.Ct. 2742 (1993). In pretext case, the plaintiff seeks to prove that the defendant's proffered legitimate reasons for employment action was, in reality, a pretext for a sexually motivated decision.

The legal standards which allocate the evidentiary burdens in a Title VII disparate treatment case are:

> 'First, the plaintiff has the burden of proving by a preponderance of the evidence a prima facie case of discrimination. Second, if the plaintiff succeeds in proving the prima facie case, the burden shifts to the defendant "to articulate some legitimate, non discriminatory reason for the employee's rejection."

Ballinger v. North Carolina Agr. Extension Service, 815 F.2d 1001, 1005 (4th Cir.), cert. d*enied*, 404 U.S. 897 (1987)

(citing Burdine, 450 U.S. at 253) (quoting McDonnell Douglas, 411 U.S. at 802–04)).

However, after the defendant comes forward with their reasons, the jury decides "the ultimate question, whether the plaintiff[s] have proven 'that the defendant intentionally discriminated against them.'" Hicks, __ U.S. at __, 113 S.Ct. at 2749 (citing Burdine, 450 U.S. at 253).

Moreover, "[t]hroughout, the plaintiff retains the ultimate burden of persuasion." Fuller, supra, at *5. In order to establish a prima facie case of employment discrimination based on gender,

> [plaintiff] must have demonstrated, by a preponderance of the evidence, that she was a member of a protected class who was qualified for an available position but was rejected under circumstances giving rise to an inference of unlawful discrimination.

Ballinger, 815 F.2d at 1005 (citing *Burdine*, 450 U.S. at 253).

In the instant case, assuming the jury found that both Plaintiff and Defendant satisfied their evidentiary obligations, the fact remains that the jury found that Plaintiffs' sex was not the determinative factor in Defendant's decision not to distribute DOD accounts to the Plaintiffs. This is so because the jury answered Verdict From Question Number 2 in the affirmative, which means that the jury believed the Defendant would have made the same employment decision concerning the Plaintiffs' even if the unlawful motive, Plaintiffs' sex, was not present.

The evidence in the record clearly shows that the Defendant would not have reallocated accounts and equalized earning potential even if Plaintiffs were male. By Plaintiffs own admission, Mr. Martin Hickey, a male civil government account executive, was not given an opportunity to earn as much as account representatives who sold to the Army, Navy and Air Force. (Mayo, T.1 a 298:20 – 299:17); (Drew, T.1 at 201:8 – 12).

Moreover, Plaintiff Drew also admitted that their complaint concerning account allocation, and subsequent earning potential, applied with as much force to Mr. Hickey as it did to them. (Drew, T.1 at 198:8 – 201:7; T.1 at 299:20 – 300:13).

Consequently, from such evidence a jury could reasonably conclude that even if Plaintiffs were male, the Defendant would still have made the same employment decision. This was precisely what the jury's verdict reflected in answering Verdict Form Question Number 2 as it did.

Further proof of Defendant's legitimate, nondiscriminatory factors in deciding not to reallocate accounts to equalize the earning potential of the account executives, is the evidence that it was a good business practice to allow account representatives to maintain major accounts in order to foster established sales relationships. (Shaver, T.2 at 68:12 – 70:8); (Johnson, T.3 at 102:12 – 105:2); (Graske, T.2 at 226:4 – 12).

The jury could reasonably have concluded that the Defendant legitimately strove to maintain consistent business relationships, instead of disrupting major accounts by frequently replacing account executives, and facing a possible loss of its core business accounts. Moreover, even Plaintiff Drew testified that developing a business relationship with the people who purchase your equipment is beneficial because the customer grows to trust the account representative, and it enhances the representative's ability to sell. (Drew, T.1 at 169:13 – 170:5). Plaintiff Drew also testified that, as a general rule, it would be irresponsible for the Defendant to take away a major account from an established account executive and give it to someone else. (Id. At 205:1–20).

The jury found that the Defendant would have made the same employment decision concerning the Plaintiffs even if the unlawful motive, Plaintiffs' sex, was not present. Thus, the jury found that Plaintiffs' sex, was not present. Thus, the jury found that Plaintiffs' sex was not the determining factor in its decision not to distribute DOD accounts to the Plaintiffs. Rather, Defendant's decision was predicted on sound business judgment in order to maintain consistent business

relationships. Consequently, the Defendant presented legally sufficient evidence to support the jury's finding that the Defendant would not have distributed DOD accounts to equalize Plaintiffs' earnings even if they had been male.

Accordingly, for the reasons expressed above, Plaintiffs' motion for a judgment as a matter of law is **DENIED**.

Plaintiff asks, in the alternative, for a new trial on the sole issue of whether the Defendant would not have distributed DOD accounts to equalize Plaintiffs earnings in the absence of the impermissible factor.

In interpreting Rule 59(a) of the Federal Rules of Civil Procedure, the Fourth Circuit court of Appeals has stated that:

> A trial judge has a duty to set aside a verdict and grant a new trial even though it is supported by substantial evidence if he is of the opinion that the verdict is against the clear weight of the evidence, or is based upon evidence which is false or will result in miscarriage of justice.

Wyatt v. Interstate & Ocean Transport. Co., 623 F.2d 888, 891–92 (4th Cir. 1980); *see also Whalen v. Roanoke County Bd. Of Supervisors*, 769 F. 2d 221, 226 (4th Cir. 1985) ("[t]he court should exercise its discretion to grant a new trial 'whenever, in its judgment, this action is required in order to prevent injustice.'") (citation omitted); *Gill v. Rollins Protective Services*, 836 F.2d 194, 196 (4th Cir. 1987).

The jury's verdict reflects the fact that the Defendant would have made the same employment decision not to distribute DOD accounts to equalize Plaintiffs' earnings even if the impermissible motive was not present. The Court finds that the verdict of the jury is not against the clear weight of the evidence, is not based upon false evidence, and will not result in a miscarriage of justice.

Accordingly, Plaintiffs' motion for a new trial is **DENIED**.

November 7, 1995
Alexandria, Virginia

James C. Cacheris
United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA

Alexandria Division

SALLY W. DREW **JUDY MAYO,**	)	
Plaintiffs	)	CA No. 95 269A
v.	)	
RICOH CORPORATION,	)	
Defendant	)	

ORDER

For the reasons stated in the accompanying Memorandum Opinion, it is hereby **ORDERED** that:

Defendant's renewed motion for judgment as a matter of law as to Verdict Form Question Number 1 is **GRANTED**;

Plaintiffs' motion for judgment as a matter of law as to Verdict Form Question Number 2 is **DENIED**;

In the alternative, Plaintiffs' motion for a new trial as to Verdict Form Question Number 2 is **DENIED**; and

Plaintiffs' motion to alter or amend judgment and for equitable relief is **DENIED**.

The Clerk is directed to send a copy of this Order to all counsel of record.

November 7, 1995
Alexandria, Virginia

James C. Cacheris
UNITED STATES
DISTRICT JUDGE

(3)

Supreme Court, U.S.
F I L E D
AUG 7 1997
CLERK

No. 97-13

In The
Supreme Court of the United States

October Term 1997

SALLY W. DREW,
JUDY MAYO,

Petitioners,

v.

RICOH CORPORATION,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

**Reply Brief in Support of
Petition for Writ of Certiorari**

Vicki G. Golden
Counsel of Record
Michael G. Kane
CASHDAN & GOLDEN, PLLC
1150 Connecticut Avenue, NW
Suite 900
Washington, DC 20036-4104
(202) 862-4330

Counsel for Petitioners

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REPLY BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

Respondent's Brief in Opposition to Petition for Certiorari is flawed in several respects.

The Circuit Courts of Appeal are Split As To Whether "Motivating Factor" Is The Correct Standard For Liability In All Title VII Discrimination Cases

Respondent attempts to confuse the issues when it calls a jury instruction in accordance with the liability standard set out in 42 U.S.C. § 2000e-2(m) a "mixed motive" instruction. Such instruction is more properly labeled the "motivating factor" instruction. The issue is whether the motivating factor standard set out in Section 2000e-2(m) is the only standard for liability in a disparate treatment discrimination case, not whether courts continue to use the "mixed motive" and "pretext" analysis in relation to remedies.

Respondent mischaracterizes the holding of *Fields v. New York State Office of Mental Retardation and Developmental Disabilities*, 115 F.3d 116 (2nd Cir. 1997). In that case, the court held that, although the plaintiff had not presented direct evidence of discrimination, he needed to show only that "the prohibited factor was at least one of the motivating factors in the adverse employment decision." *Fields* at 121. The is directly contrary to the holding of the Fourth Circuit in this case.

The use of the term "dual motivation" in Respondent's brief is deceptive. The part of the *Fields* opinion that Respondent quotes at length did not deal with the issue of whether the plaintiff was entitled to a "motivating factor" instruction. That part of the opinion discussed the refusal of the trial court to give an instruction on the employer's affirmative defense that it would have taken the same action in the absence of the impermissible factor, pursuant to 42 U.S.C. § 2000e-5(g)(2)(B), which the court called the "dual motivation instruction." The plaintiff had requested the instruction, and the defendant had objected. The Second Circuit held that the plaintiff was not "entitled to have the jury informed of an affirmative defense not desired by the defendant" in the absence of direct evidence. *Fields* at 123-124. Thus the "dual motive instruction" at issue in *Fields* pertained only to remedy and not to liability. Accordingly, that portion of the decision sheds no light on the issue before this Court.[1] *See also, Renz v. Grey Advertising,* 1997 U.S. App. LEXIS 19993, n.5 (2nd Cir. August 4, 1997) ("a Title VII or ADEA plaintiff proves discrimination by demonstrating that race, gender, or age played a motivating role in the employer's decision.")

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[1] Respondent also misrepresents the Eleventh Circuit's holding in *Harris v. Shelby County Board of Education,* 99 F.3d 1078, 1084 (11th Cir. 1996). In that case, at footnote 2, the court explicitly held that the plaintiff presented only circumstantial evidence of discrimination. Nevertheless, the court held that the plaintiff need only prove that his race was a motivating factor in order to obtain some limited relief. Thus, *Harris* stands in direct conflict with the Fourth Circuit.

This is an Appropriate Case for Review

In arguing that this is not an appropriate case for review, Respondent again is misleading. It seriously mischaracterizes the findings of the District Court, which were affirmed on appeal. The District Court did not hold that the Petitioners had not presented "legally sufficient evidence" that their sex was a motivating factor in the contested employment decision, as Respondent asserts. (Opposition at 15). Rather, the District Court concluded that the Petitioners did not present "sufficient direct evidence" of discrimination to qualify for the motivating factor instruction.[2] (11A). The District Court did not extinguish the jury's finding that gender discrimination was a motivating factor in the adverse employment actions. The fact that the jury found that gender discrimination was a motivating factor in Respondent's actions makes this an ideal case for Supreme Court Review.

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[2] The District Court granted judgment to Respondent because it concluded that the jury's finding that the Respondent would have taken the same actions absent consideration of the impermissible factor was equivalent to a finding that sex was not a "determinative factor."

CONCLUSION

For the reasons set forth above and in the Petition, this Honorable Court should grant certiorari and reverse the holding below

Respectfully submitted,

Vicki G. Golden
Counsel of Record
Michael G. Kane
CASHDAN & GOLDEN, PLLC
1150 Connecticut Avenue NW
Washington, D.C. 20036-4104
(202) 862-4330